RECORD AND BRIEFS

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Because "most constitutional errors can be harmless," this Court has "adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction" and instead is subject to a "harmless-error analysis." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

At the same time, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. The consequences of such errors are "necessarily unquantifiable and indeterminate" and are therefore not susceptible to a harmless-error inquiry. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993).

The question presented is whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.

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Kentel Myrone Weaver respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (app., *infra*, 1a-41a) is reported at 54 N.E.3d 495. The opinion of the Suffolk Superior Court (app., *infra*, 42a-65a) is unreported.

JURISDICTION

The final judgment of the Supreme Judicial Court of Massachusetts was entered on July 20, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to have the Assistance of Counsel for his defence.

STATEMENT

The lower courts are deeply divided over whether a criminal defendant must prove actual prejudice resulting from ineffective assistance of counsel when the consequence of the ineffective assistance is a structural trial defect. The conflict is the result of an acknowledged tension between "two competing lines of authority from [this] Court." *Winston* v. *Boatwright*, 649 F.3d 618, 622 (7th Cir. 2011).

On the one hand, the Court said in *Strickland* v. *Washington*, 466 U.S. 668 (1984), that in order to obtain relief on the basis of ineffective assistance of counsel, a criminal defendant must show not only that

his counsel's performance was deficient, but also "that the deficient performance prejudiced the defense." *Id.* at 687. That makes sense: A deficiency that makes no practical difference ordinarily should not be a basis for scrapping an entire trial and starting over from scratch.

On the other hand, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). The "precise effects" of structural rights on the course of a trial are "indeterminate" and "unmeasurable." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). Such rights include (among others) the right to trial by jury, the right to a loyal attorney, the right to an impartial judge, and the right to a public trial; without observance of these rights, "a criminal trial cannot reliably serve its function." *Ibid.*

The lower courts are in conflict over how to reconcile these two doctrines when they intersect—that is, when a trial lawyer's incompetence results in a structural error. The First, Sixth, Seventh, and Eighth Circuits and the highest courts in Montana and the District of Columbia have held that the prejudice required by *Strickland* must be presumed when ineffective assistance leads to a structural error. But the Second, Third, Fifth, and Eleventh Circuits, as well as the highest courts of Georgia, Massachusetts, Michigan, Wisconsin, and Utah disagree.

This issue is not academic—in this case and all others like it, the defendant's entitlement to a new trial hangs in the balance. Here, petitioner's trial counsel incompetently failed to object to a two-day closure of the courtroom during jury empanelment—a textbook structural error. The lower court nevertheless denied

petitioner relief because he could not show actual prejudice from his lawyer's deficient performance—a holding that placed petitioner in the Catch-22 of having to prove something that the First Circuit has said is "impossible" to prove. *Owens* v. *United States*, 483 F.3d 48, 65 (1st Cir. 2007). In any of the six jurisdictions on the other side of the conflict, the outcome would have been different: prejudice would have been presumed, and petitioner would have gotten his new trial.

Further review is therefore imperative. The question presented arises frequently and is critically important in each case in which it arises. Moreover, this case presents a clean and fully-developed vehicle for addressing the question. The petition accordingly should be granted.

A. Structural errors and trial errors

This Court's cases recognize two broad categories of constitutional errors in criminal trials: trial errors (as to which prejudice must be demonstrated) and structural errors (as to which prejudice is presumed).

1. A trial error is a discrete error that "'occur[s] during presentation of the case to the jury.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-308). Trial errors include admission of evidence obtained in violation of the Fourth Amendment (*Chambers* v. *Maroney*, 399 U.S. 42 (1970)), a prosecutor's comment on the defendant's silence in violation of the Fifth Amendment (*Chapman* v. *California*, 386 U.S. 18 (1967)), and a restriction on a defendant's right to cross-examine a witness in violation of the Sixth Amendment (*Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). See *Fulminante*, 499 U.S. at 306-307 (collecting examples).

Trial errors like these are ordinarily isolated, and analyzing "'their effect on the factfinding process at trial'" is not especially difficult. *Sullivan*, 508 U.S. at 279 (quoting *Van Arsdall*, 475 U.S. at 681). It is easy enough to determine, for example, whether there was sufficient evidence to support a conviction separate and apart from evidence entered in violation of the Constitution. Such errors may "'be qualitatively assessed in the context of other evidence presented in order to determine'" whether the error affected the outcome. *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 308). Thus trial errors are generally understood to be "amenable to harmless-error analysis" and will not support a grant of relief unless the defendant can show that the violation "'contribute[d] to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24).

Ineffective assistance of counsel is typically a trial error. Thus, to obtain relief under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

2. Structural errors are different in two ways. First, structural defects "'affect the framework within which the trial proceeds,'" and are not "'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310). Thus they strike at the fundamental fairness of the trial. "'Without [the] basic protections [of structural rights], a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). "'The harmless

error rule,'" which is focused on narrow, case-specific considerations, is inapt "'to gauge the great, though intangible, societal loss that flows'" from structural errors of this type. *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *People* v. *Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979)).

Second, structural errors simply "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. "[T]he usual harmless error analysis of looking at all the evidence and assessing the strength of the case simply does not answer the question of whether reversal is necessary in these cases, since the problem is not with the quantity or quality of evidence, but rather with some other [inherent] aspect of the process." Amy Knight Burns, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 Stan. L. Rev. 727, 733 (2012). The "precise effects" of structural errors are, in other words, "unmeasurable" and "unquantifiable" and "indeterminate." *Sullivan*, 508 U.S. at 281-282. Because "the effect of [a structural] violation cannot be ascertained," structural errors are "not amenable to harmless-error review." *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986).

Take, for example, the "Sixth Amendment right to counsel of choice." *Gonzalez-Lopez*, 548 U.S. at 148. "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Id.* at 149. The choice of attorney therefore does make a practical difference to the course of a trial. But "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."

Id. at 150. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Ibid.*

Take, as another example, the closure of a courtroom—the structural error at issue here. "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). Thus, an open and public trial also makes a practical difference. But as with the right to counsel of choice, evaluating the effect of a courtroom closure on the outcome of a trial would entail a "speculative inquiry into what might have occurred in an alternate universe" (*Gonzalez-Lopez*, 548 U.S. at 150), implicating an endless chain of what-ifs and imponderable counterfactuals. "[U]nguided speculation" of this sort is not an acceptable basis "to judge intelligently the impact" of an error on a trial. *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

For these reasons, the consequences of structural errors are *presumed* to be prejudicial, requiring "automatic reversal." *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993).

B. The courtroom closure

Fifteen-year-old Germaine Rucker was shot and killed. App., *infra*, 1a. Petitioner, then just sixteen, was indicted and tried for the murder. App., *infra*, 1a.

During the two-day empanelment of the jury, "a court officer informed" interested members of the public "that the courtroom was 'closed' during the jury selection." App., *infra*, 50a. "[T]he courtroom remained closed to [all] members of the public for the duration of the [two-day] empanelment." *Id.* at 52a. Accord *id.* at 53a ("I find that a court officer * * * closed the court-

room to the defendant's family and other members of the public during the entirety of the empanelment.").

C. Proceedings below

1. Petitioner was convicted of murder and possession of an unlicensed firearm. App., *infra*, 42a. Following an unsuccessful direct appeal, he obtained new counsel and filed a motion for a new trial. The motion alleged among other things that trial counsel's failure to object to petitioner's Sixth Amendment right to a public trial amounted to ineffective assistance. *Ibid.*

Following a hearing that included live witness testimony, the trial court denied the motion. App., *infra*, 42a-65a. With respect to the relevant facts, the trial court found "that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment." *Id.* at 53a. It found further that "there was a full closure of the courtroom, rather than a partial closure" because there was "no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom." *Id.* at 57a "The sole reason for the closure," moreover, "was the crowded condition in the courtroom." *Id.* at 53a.

With respect to the law, the trial court recognized that court closures narrowly drawn to serve an "overriding interest" do not violate the Sixth Amendment. App., *infra*, 57a-58a (citing *Waller*, 467 U.S. at 48). But, the trial court held, "courtroom crowding falls short as a justification for the closure at issue here." *Id.* at 58a. "[E]ven if management of the crowded conditions in the courtroom rose to the level of 'overriding interest,'" the court went on, "the closure in this case was far broader than necessary in both time and

reach." *Id.* at 59a. Thus, the trial court concluded, "the closure in this case cannot be justified as a valid limitation of the defendant's Sixth Amendment rights," and "[a] structural error * * * occurred during the empanelment." *Id.* at 58a, 64a.

The trial court held further that "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "'serious incompetency.'" App., *infra*, 62a-63a. Defense counsel's performance was therefore deficient. *Ibid.* And for his part, petitioner was "unaware of his right to a public trial, [and] did not intentionally waive this right." App., *infra*, 62a. Indeed, he raised it at the first possible opportunity.

The trial court nevertheless denied petitioner's motion for a new trial because dictum appearing in *Commonwealth* v. *Dyer*, 955 N.E.2d 271 (Mass. 2011), "expressly declin[ed] to apply [a] 'structural error' analysis" to ineffective assistance claims involving structural errors and instead called for an actual prejudice inquiry. App., *infra*, 64a (citing *Dyer*, 955 N.E.2d at 280-281). Because "[t]he defendant has not offered any evidence or legal argument establishing prejudice," the court denied the motion. *Ibid.*

2. Petitioner appealed to the Supreme Judicial Court of Massachusetts. See Mass. Gen. Laws ch. 278, § 33E. While the appeal was pending, the court decided *Commonwealth* v. *LaChance*, 17 N.E.3d 1101 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015). The court in *LaChance* approved the dictum in *Dyer*, holding that criminal defendants may not avail themselves of "the presumption of prejudice that would otherwise apply to a preserved claim of structural error" in the context of

a *Strickland* claim predicated on a failure to raise the structural error. *Id.* at 1105-1107.

Two justices dissented in *LaChance*, stating that the majority's decision had "effectively foreclose[d] vindication of [a] constitutional right on collateral review, even in cases where trial counsel has rendered constitutionally deficient performance * * * and neither the defendant nor his counsel knowingly waived his right to a public trial." *LaChance*, 17 N.E.3d at 1107 (Duffly, J., dissenting). In the dissenting justices' view, "the very nature of a right to which presumptive prejudice attaches—such as the right to an open court—is that a showing of prejudice is not possible" as a practical matter. *Id.* at 1108-1109. Requiring proof of prejudice will therefore effectively preclude vindication of the right in virtually every case. *Ibid.*

3. Relying on *LaChance*, the Supreme Judicial Court affirmed the denial of a new trial in this case. App., *infra*, 1a-41a. Although the court agreed that "counsel's inaction" in failing to object to the closure "was the product of 'serious incompetency,'" it concluded that the trial court's denial of a new trial was not erroneous because petitioner "failed to show that trial counsel's conduct caused prejudice." *Id.* at 40a. Although the "violation of [petitioner's] Sixth Amendment right to a public trial constitutes structural error," the court reasoned, the trial court correctly "anticipated the rule announced in *LaChance*" and thus correctly denied relief because "the defendant * * * [had] failed to show that trial counsel's conduct caused prejudice warranting a new trial." *Id.* at 39a-40a (emphasis omitted).

REASONS FOR GRANTING THE PETITION

There is a deep, well-recognized conflict among the lower courts regarding the standard for determining prejudice when ineffective assistance of counsel leads to a structural violation. Some courts have concluded that prejudice must be presumed if the defendant establishes deficient performance resulting in a structural error. Other courts hold that actual prejudice must be established notwithstanding the unquantifiable consequences of structural errors. As a result, identically-situated criminal defendants are being treated fundamentally differently—some are being granted new trials, while others are not.

The courts holding that prejudice must be presumed have the better of the argument. Structural errors are defects in the trial mechanism itself, and their consequences are necessarily indeterminate. If defendants were required to demonstrate prejudice in ineffective-assistance cases involving structural errors, relief would effectively be impossible to obtain. The issue is important, frequently recurring, and cleanly presented for this Court's review. The petition should be granted.

A. There is a deep and acknowledged conflict over the question presented

Courts have widely acknowledged the conflict of authority implicated here. The Michigan Supreme Court, for example, has recognized the division among "the United States Courts of Appeals for the First and Eighth Circuits," which "have ruled that a structural error automatically satisfies the *Strickland* prejudice prong," and "the United States Court of Appeals for the Eleventh Circuit and the Georgia and Utah Supreme Courts," which "have held that an ineffective assis-

tance of counsel claim premised on a structural public trial right violation still requires a defendant to demonstrate actual prejudice." *People* v. *Vaughn*, 821 N.W.2d 288, 307-308 (Mich. 2012).

Recognizing the same division of authority, the Massachusetts Supreme Judicial Court stated in *LaChance* that it "do[es] not agree with the reasoning of [the First Circuit] in this context" and instead is "more aligned with that of the United States Court of Appeals for the Eleventh Circuit." *LaChance*, 17 N.E.3d at 1106. Similarly, Judge Kethledge of the Sixth Circuit recognized that although the Sixth Circuit's answer to the question presented comports with a decision of the First Circuit, it "directly conflicts" with a decision of the Eleventh Circuit. See *Johnson* v. *Sherry*, 586 F.3d 439, 449 (6th Cir. 2009) (Kethledge, J., dissenting).

In fact, the split is far deeper than any of these courts has acknowledged: Whereas six circuits and state high courts hold that actual prejudice must be presumed in cases like this one, nine circuits and state high courts hold that prejudice may not be presumed. In the face of such an entrenched conflict, this Court's intervention is desperately needed.

1. Six circuits and state high courts hold that actual prejudice must be presumed in cases like this one

Four courts of appeals and two state high courts have held—contrary to the ruling below—that when a defendant claims ineffective assistance of counsel resulting in a structural error, the reviewing court must apply the same presumption of prejudice that governs the structural error on direct review.

In the **First Circuit**, "a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007). Citing this Court's determinations that it is impossible to identify prejudice resulting from structural errors, including violations of a defendant's right to a public trial, the First Circuit concluded that it would "not ask defendants to do what the Supreme Court has said is impossible," by requiring that they show prejudice where ineffective assistance of counsel leads to a structural error. *Id.* at 65. "If the failure to hold a public trial is structural error, and it is impossible to determine whether a structural error is prejudicial, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Id.* at 66 (citations omitted).

The **Sixth Circuit** reached the same conclusion in *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), with respect to a state habeas petitioner's claim that his counsel had been constitutionally ineffective in failing to object to a courtroom closure during testimony at trial. *Id.* at 445. The court ordered an evidentiary hearing and observed that, under *Strickland*, a habeas petitioner who "establish[es] that counsel's performance was deficient" is also "required to demonstrate that he was prejudiced by the error." *Id.* at 446-447. The court held, however, that if the defendant on remand succeeded in showing that his trial counsel's performance was deficient and resulted in a structural denial of the defendant's public trial right, "prejudice

would be presumed" for purposes of the *Strickland* analysis. *Id.* at 447.[1]

The **Seventh Circuit** took a similar approach in *Winston* v. *Boatwright*, 649 F.3d 618 (7th Cir. 2011). There, the court of appeals held that "Winston's lawyer's performance was constitutionally inadequate," resulting in a jury-composition error under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). 649 F.3d at 632. But the court noted that the interplay between *Batson* and *Strickland* presented "a problem: while a direct *Batson* claim would be viewed as a structural error and thus not subject to a harmless-error rule, a *Strickland* argument requires an examination of prejudice." *Ibid.* After weighing the competing considerations and recognizing that "[u]nconstitutional juror strikes, like other structural errors, create the kind of problem that 'def[ies] analysis by harmless error standards,'" the court there held that "prejudice automatically flows from a deliberate *Batson* violation" in the context of a claim for ineffective assistance of counsel under *Strickland*. *Id.* at 633.[2]

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[1] *Johnson* involved a federal habeas petitioner challenging a state-court conviction. That posture required the petitioner to make "two showings of prejudice"—one called for by *Strickland* and the other required by *Coleman* v. *Thompson*, 501 U.S. 722 (1991), under which a habeas petitioner must show cause and prejudice to overcome a state procedural default (including waiver caused by ineffective assistance). 586 F.3d at 447 n.7. The Sixth Circuit agreed with the First Circuit's conclusion in *Owens* that the two prejudice requirements "overlap" and thus addressed them as one and the same. *Ibid.*

[2] The court in *Winston* ultimately denied relief because the case involved review of a state-court judgment under Section 2254, and the court could not say that this Court had clearly established the structural nature of *Batson* errors at the time the state rendered its judgment. 649 F.3d at 633-634.

The **Eighth Circuit** has adopted the identical rule: "when counsel's deficient performance causes a structural error," that court "will presume prejudice under *Strickland*." *McGurk* v. *Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998). Defense counsel in *McGurk* had failed to recognize that his client was entitled to a trial by jury, and as a result deprived him of that right. The Eighth Circuit broadly addressed "structural error," including the right to a public trial, and held that "failure on the part of counsel to ensure that mechanisms fundamental to our system of adversarial proceedings are in place cannot * * * constitute harmless error." *Id.* at 475 & n.5. The Eighth Circuit thus held that the state court in that case had "erred in requiring a showing of actual prejudice" and remanded "with instructions to issue the writ of habeas corpus unless, within a reasonable time to be designated by the district court, the state affords petitioner a new trial." *Id.* at 475.[3]

Two state courts have reached the same conclusion as the First, Sixth, Seventh, and Eighth Circuits. In *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013), the **District of Columbia Court of Appeals** held that prejudice must be presumed for *Strickland* purposes when the ineffective assistance permits a violation of the public trial right. The court reasoned in particular that, because prejudice is "impossible to identify" when

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[3] The Eighth Circuit more recently affirmed in a court-closure case that "under [its] precedent, 'when counsel's deficient performance causes a structural error, [it] will presume prejudice under *Strickland*.'" *Addai* v. *Schmalenberger*, 776 F.3d 528, 535 (8th Cir.) (quoting *McGurk*), cert. denied *sub nom. Addai* v. *Braun*, 136 S. Ct. 73 (2015). Like the Seventh Circuit in *Winston*, the Eighth Circuit denied relief in *Addai* because the case arose under Section 2254, and the court could not say that the state court's particular error violated "clearly established federal law" under this Court's precedents. *Id.* at 535-536.

the error is structural, requiring the defendant to prove prejudice "as a result of trial counsel's waiver of his public trial right would be inconsistent with the Supreme Court's holdings that prejudice is presumed when the constitutional error is a structural defect." *Id.* at 1043.

The **Montana Supreme Court** reached the same conclusion in *Montana* v. *Lamere*, 112 P.3d 1005 (Mont. 2005). There, the court concluded that "defense counsel's performance was deficient" because he permitted a biased juror to be seated and thereby failed to "secure an impartial jury." *Id.* at 1013. Because the upshot of "counsel's deficient performance" was the introduction of a structural error, the court reasoned, "the integrity of the entire trial" was "undermined," and "prejudice is therefore presumed" for purposes of "the second prong of the *Strickland* test." *Id.* at 1013-1014. *Accord id. at 1013* ("prejudice is adequately established because a structural error existed, and such errors are presumptively prejudicial"). The court thus concluded that the petitioner had "satisfied both prongs of the *Strickland* test" because "[c]ounsel's failure to ensure that the jury was impartial" was both "deficient" and "produced a structural error, and thus prejudice is presumed." *Id.* at 1014.

Against this backdrop, there can be no doubt that petitioner here would have been granted a new trial if his motion had been filed in the First, Sixth, Seventh, or Eighth Circuits or the courts of the District of Columbia or Montana.

2. *Nine circuits and state high courts, including the court below, hold that prejudice may not be presumed*

Other lower courts of appeals have reached the same conclusion as the Massachusetts Supreme Judicial Court did in this case, holding that a criminal defendant must demonstrate actual prejudice when a structural-error claim is raised as part of a claim of ineffective assistance of counsel.

The **Eleventh Circuit**, for example, rejected an ineffective assistance claim based on defense counsel's failure to object at trial to a partial courtroom closure, holding that the defendant "has not established that he was prejudiced by his trial counsel's failure to object to the closure of the courtroom." *Purvis* v. *Crosby*, 451 F.3d 734, 738 (11th Cir. 2006). "If counsel had objected in a timely fashion" to the courtroom closure, the court reasoned, "there is no reason to believe that would have changed the victim's testimony." *Id.* at 738-739. The court thus rejected the argument that prejudice should be presumed because of the structural nature of the error at trial:

> It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim.

Id. at 740. Thus, in the Eleventh Circuit's view, it could not "dispense with the prejudice requirement for attorney error * * * without defying the Supreme Court's clear holding" in *Strickland*. *Id.* at 741.

The **Second, Third, and Fifth Circuits** have reached the same conclusion (*United States* v. *Gomez*, 705 F.3d 68, 79-80 (2d Cir. 2013); *Palmer* v. *Hendricks*, 592 F.3d 386, 397-98 (3d Cir. 2010); *Virgil* v. *Dretke*, 446 F.3d 598, 612 (5th Cir. 2006)), as have the courts of last resort in **Georgia, Michigan, Wisconsin, and Utah**. See *Reid* v. *State*, 690 S.E.2d 177, 180-181 (Ga. 2010); *People* v. *Vaughn*, 821 N.W.2d 288, 306-308 (Mich. 2012); *State* v. *Pinno*, 850 N.W.2d 207, 230-231 (Wis. 2014); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989).[4]

* * *

The courts of appeals and the state high courts are thus deeply divided on the question presented, and the conflict cannot resolve itself. Worse, the division of authority here puts the First Circuit in conflict with Massachusetts, the Sixth Circuit in conflict with Michigan, and the Seventh Circuit in conflict with Wisconsin. In each of these States, identical constitutional claims are being treated one way in state court (new trials are denied) and another way in federal

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[4] The Ninth Circuit is internally conflicted on the issue. In *Styers* v. *Schriro*, 547 F.3d 1026 (9th Cir. 2008), the court explained that when an ineffective assistance claim "directly implicates [a structural error like] the impartiality of the jury," no "additional or separate showing of prejudice would appear necessary" to establish a *Strickland* violation. *Id.* at 1030 n.5. Yet the court had earlier held that defendants must demonstrate actual prejudice in cases like this. See *Vansickel* v. *White*, 166 F.3d 953, 958-959 (9th Cir. 1999). Judge Reinhardt dissented in *Vansickel*, explaining that "application of such an actual prejudice standard constitutes an impossibility" in ineffective-assistance cases involving structural errors because "the error is one that we have clearly stated is not susceptible of actual prejudice analysis." *Id.* at 961. The apparent conflict within the Ninth Circuit's precedents counsels further in favor of this Court's intervention.

court (new trials are granted). Only this Court can resolve this stark and untoward conflict.

B. *Strickland*'s prejudice requirement is presumptively satisfied when ineffective assistance results in a structural error

Review is furthermore warranted because the decision below is wrong. Requiring a defendant to demonstrate prejudice from the violation of his public trial right is inconsistent with this Court's precedents concerning the unique nature of "structural" errors.

1. Structural errors, unlike trial errors, "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. Trial errors may "be quantitatively assessed in the context of other evidence * * * in order to determine" whether the error affected the outcome. *Id.* at 308. Structural rights are "markedly different," because they are "defects in the constitution of the trial mechanism" itself. *Id.* at 309. The consequences of denials of structural trial rights are therefore "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282. If defendants were required to make a showing of prejudice in cases involving structural errors, therefore, relief would be impossible to obtain, "for it would be difficult to envisage a case in which [they] would have evidence available of specific injury.'" *Waller*, 467 U.S. at 50 n.9 (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (en banc)).

That is particularly true in cases involving a denial of the right to a public trial. The public trial right serves a vital function in ensuring that "judge and prosecutor carry out their duties responsibly" and "encourag[ing] witnesses to come forward and discourag[ing] perjury." *Waller*, 467 U.S. at 46. More general-

ly, "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes* v. *Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). While these consequences of a public trial are essential to fundamental fairness—and just as relevant to jury empanelment as to trial itself (*e.g.*, *United States* v. *Negron-Sostre*, 790 F.3d 295 (1st Cir. 2015))—they are also undeniably "intangible," often a "matter of chance," and thus impossible to quantify and prove. *Waller*, 467 U.S. at 49 n.9.

The Court's conclusion that structural errors are by definition errors that "defy" harmless error review applies equally in the ineffective assistance context. Such an analysis would involve a "speculative inquiry into what might have occurred in an alternate universe," just as it does on direct review. *Gonzalez-Lopez*, 548 U.S. at 150.[5] Defendants would be obliged to carry a burden of proving counterfactual details that this Court has recognized is "impossible to know" and "impossible * * * to quantify." *Ibid.* Absent a presumption of prejudice, therefore, a significant category of trial counsel errors would, as a practical matter, be exempted entirely from the Sixth Amendment's critical protection of effective assistance of counsel.

2. No feature of collateral review justifies a different standard for structural errors. In *LaChance*, the Massachusetts Supreme Judicial Court invoked the importance of finality in arguing against a presump-

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[5] Even if it were otherwise, while "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," it "does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Gonzalez-Lopez*, 548 U.S. at 145 (2006).

tion of prejudice. 17 N.E.3d at 1106. To be sure, finality is an important interest, but *Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel "is burdened by an actual conflict of interest." 466 U.S. at 692. That is because, "it is difficult to measure the precise effect on the defense" of conflicted representation. *Ibid.* The same conclusion applies with respect to the Sixth Amendment right to a public trial.

The lower court, in *LaChance*, also expressed concern that defense counsel could "'harbor error as an appellate parachute'" by failing to object and then invoking an unpreserved "structural" error to obtain a new trial. 17 N.E.3d at 1107 (quoting *Vaughn*, 821 N.W.2d at 308). But a court applying the deficient performance prong of *Strickland* must consider whether the failure to object was a tactical decision, and therefore not constitutionally defective representation, in determining whether counsel's "identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689-690. In cases where counsel knowingly decline to raise particular issues for tactical reasons, in other words, there would be no deficient performance to begin with.

C. This case is a perfect vehicle for addressing the question presented

Review is especially appropriate here because this case is a pristine vehicle for addressing the question presented. The trial court made detailed findings of fact and issued thorough conclusions of law concerning the courtroom closure and petitioner's counsel's deficiency. The Supreme Judicial Court accepted the trial court's findings and disposed of the cases as a pure matter of law.

First, the lower courts found that the courtroom was fully closed for two entire days of jury empanelment. The trial court heard testimony from multiple witnesses establishing that "a court officer told [petitioner's mother] that the courtroom was 'closed for jury selection'" during the two days of *voir dire*. App., *infra*, 48a, 50a. Thus, according to the trial judge, "the courtroom remained closed to [all] members of the public for the duration of the empanelment." *Id.* at 52a. Accord *id.* at 53a ("I find that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment."). The Supreme Judicial Court agreed. See *id.* at 39a.

The trial court held, moreover, that "there was a full closure of the courtroom, rather than a partial closure." App., *infra*, 57a. There was "no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom." *Ibid.* The Supreme Judicial Court, for its part, again "agree[d] with the * * * conclusion that the closure was a full, rather than partial, closure of the court room." *Id.* at 39a.

Second, the lower courts held that this was a structural error. The trial court found that "[t]he sole reason for the closure was the crowded condition in the courtroom" (app., *infra*, 53a) but concluded that "courtroom crowding falls short as a justification for the closure at issue here" (*id.* at 58a). "[E]ven if management of the crowded conditions in the courtroom rose to the level of 'overriding interest,'" moreover, "the closure in this case was far broader than necessary in both time and reach." *Id.* at 59a. Thus, the trial court concluded, "the closure in this case cannot be justified as a valid limitation of the

defendant's Sixth Amendment rights" (*id.* at 58a) and "[a] structural error * * * occurred during the empanelment" (*id.* at 64a).

The Supreme Judicial Court agreed that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error" and accepted the trial court's well-reasoned conclusion that such a violation occurred in this case. *Id.* at 39a (emphasis omitted).

Finally, the lower courts found that the performance of petitioner's lawyer during the trial was constitutionally deficient. The trial court held that "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "'serious incompetency.'" App., *infra*, 62a-63a. Defense counsel's performance was therefore deficient. *Ibid.* Nor did petitioner waive this right. He was "unaware of his right to a public trial, [and] did not intentionally waive this right." App., *infra*, 62a. On the contrary, he raised it at the first possible opportunity.

Against this detailed backdrop, the sole basis on which the trial court denied petitioner's motion for a new trial—and the sole basis on which the Supreme Judicial Court affirmed the denial—was the legal conclusion that petitioner was not entitled to a presumption of prejudice and (unsurprisingly) that he could not establish actual prejudice. App., *infra*, 40a, 64a. Declining to overturn *LaChance*, the Supreme Judicial Court therefore affirmed the order denying petitioner a new trial. *Id.* at 40a-41a.

The question presented is thus outcome-determinative here. Petitioner would have been entitled to a new trial if he had pressed his claim in the First, Sixth,

Seventh, or Eighth Circuits or the courts of the District of Columbia or Montana. Because—and *only* because—his claim arose in a jurisdiction on the other side of the split, he was denied that right. Such inconsistency in the application of federal constitutional law should not be tolerated.[6]

D. The question presented is important

The clean presentation of a question of constitutional law over which the lower courts are divided is basis enough for granting the petition. Yet review here is all the more appropriate because proper resolution of the question presented is a matter of tremendous practical importance.

To begin with, the issue arises with considerable frequency. The number of lower appellate courts that have weighed in on the issue—fifteen at last count—is evidence enough of that. And a simple (and surely underinclusive) Westlaw search shows that the issue has arisen in many federal district court cases over the

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[6] We are mindful that the Court has denied review of the question presented in several recent cases. But this case—which involves clearly deficient performance resulting in a clear structural error—includes none of the substantial obstacles to review that were present in those other cases. See, *e.g.*, *Commw.* v. *Jackson*, 28 N.E.3d 437 (Mass. 2015), cert. denied, 136 S. Ct. 1158 (2016) (no Sixth Amendment violation or ineffective assistance); *Commw.* v. *Penn*, 36 N.E.3d 552 (Mass. 2015), cert. denied, 136 S. Ct. 1656 (2016) (no determination of waiver or ineffective assistance); *Wilder* v. *United States*, 806 F.3d 653, 660 (1st Cir. 2015), cert. denied, 136 S. Ct. 2031 (2016) (assistance not deficient); *LaChance*, *supra*, cert. denied 136 S. Ct. 317 (2015) (no determination of waiver or ineffective assistance); *Commw.* v. *Alebord*, 4 N.E.3d 248 (Mass. 2014), cert. denied 34 S. Ct. 2830 (2014) (assistance not deficient); *Commw.* v. *Morganti*, 4 N.E.3d 241 (Mass. 2014), cert. denied 135 S. Ct. 356 (2014) (no Sixth Amendment violation or ineffective assistance).

past several years, to say nothing of state trial court cases.[7]

Beyond its frequent recurrence, the question presented is a matter of crucial importance in every case in which it arises. Structural errors are a "highly exceptional category" of constitutional violations that "undermine the fairness of a criminal proceeding as a whole." *United States* v. *Davila*, 133 S. Ct. 2139, 2149 (2013). Because any case in which the issue is outcome determinative necessarily involves a structural error, every such case implicates principles of fundamental fairness that are essential to the just and proper

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[7] See, *e.g.*, *Galloway* v. *Wenerowicz*, 2016 WL 2894476, at *6 & n.4 (W.D. Pa. 2016), report and recommendation adopted, 2016 WL 2866765 (W.D. Pa. 2016); *Lee* v. *Haas*, 2016 WL 3475324, at *9 (E.D. Mich. 2016); *Martin* v. *United States*, 2016 WL 3676590, at *4 (N.D. W. Va. 2016); *Allen* v. *Perry*, 2015 WL 3917084, at *6 (S.D. Ga. 2015), report and recommendation adopted, 2015 WL 5116778 (S.D. Ga. 2015); *United States* v. *Aguilar*, 82 F. Supp. 3d 70, 87 & n.18 (D.D.C. 2015); *Brown* v. *Price*, 2015 WL 403173, at *8 (N.D. Ala. 2015); *Juniper* v. *Zook*, 117 F. Supp. 3d 780, 792 & n.7 (E.D. Va. 2015); *Harrison* v. *Woods*, 2014 WL 6986172, at *8 (E.D. Mich. 2014); *Porter* v. *Tribley*, 2014 WL 6632123, at *8 (E.D. Mich. 2014); *Christian* v. *Hoffner*, 2014 WL 5847600, at *11 (E.D. Mich. 2014); *Alvarez* v. *United States*, 2014 WL 29383, at *4-5 (D.S.C. 2014); *Brown* v. *Thaler*, 2013 WL 3455713, at *3 & n.3 (N.D. Tex. 2013); *Hestle* v. *United States*, 2013 WL 1147712, at *6 (E.D. Mich. 2013); *Drain* v. *Woods*, 902 F. Supp. 2d 1006, 1026 (E.D. Mich. 2012); *Espada* v. *Sec'y, DOC*, 2011 WL 4459169, at *13-15 (M.D. Fla. 2011); *United States* v. *Kaufman*, 2011 WL 3299937, at *7 (D. Kan. 2011); *Strong* v. *Roper*, 2011 WL 2600241, at *14 (D. Mo. 2011); *Price* v. *Sec'y, Dep't of Corr.*, 2011 WL 2561246, at *8 (M.D. Fla. 2011); *Zimmerman* v. *Davis*, 2011 WL 1233311, at *14 (E.D. Mich. 2011); *Stevens* v. *Beard*, 2010 WL 8266292, at *6 n.3 (E.D. Pa. 2010); *Torres* v. *McNeil*, 2010 WL 5849880, at *19-21 (N.D. Fla. 2010); *Charleston* v. *McDonough*, 2010 WL 780200, at *8 (N.D. Fla. 2010); *Berryman* v. *Wong*, 2010 WL 289181, at *5-6 (E.D. Cal. 2010).

functioning of the criminal justice system. See *Negron-Sostre*, 790 F.3d 295 at 306 (a courtroom closure during jury empanelment "seriously impair[s] the fairness, integrity, or public reputation of the proceedings"). The Supreme Judicial Court openly acknowledged that the basic rules of fairness guaranteed by the Sixth Amendment were violated in this case, and yet it refused to grant relief all the same.

The Eleventh Circuit's decision in *Purvis* and the Utah Supreme Court's decision in *Butterfield* are models of an equally troubling outcome. In those cases, the courts declined even to decide whether counsel had rendered deficient performance, reasoning that it would not make a difference in light of the impossibility of proving the prejudice of a structural error. That is a perverse result. If the structural errors in *Purvis* or *Butterfield* (or this case) had been preserved by competent counsel and raised on direct appellate review, the defendants would have been entitled to new trials automatically, as a matter of law. But because they instead suffered the *added* insult of deficient trial counsel who failed to object to the error, their structural injuries became irrelevant according to those courts. That makes no sense. Further review is manifestly warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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August 2016

APPENDICES

APPENDIX A

Commonwealth *vs.* Kentel Myrone Weaver

SJC-10932

SUPREME JUDICIAL COURT OF MASSACHUSETTS

January 12, 2016, Argued
July 20, 2016, Decided
July 29, 2016, Corrected

Present: Gants, C.J., Spina, Cordy, Duffly, & Lenk, JJ.

OPINION

Cordy, J. On the evening of August 10, 2003, fifteen year old Germaine Rucker was shot and killed. The defendant, who was sixteen at the time of the shooting, subsequently admitted to committing the murder after prolonged questioning by the police and by his mother.

Prior to trial, the defendant filed a motion to suppress his statements to the police. That motion was denied following an evidentiary hearing. In 2006, a jury convicted the defendant of murder in the first degree on the theory of deliberate premeditation. He was also convicted of the unlicensed possession of a firearm. In 2011, the defendant filed a motion for a new trial under *Mass. R. Crim. P. 30*, as appearing in 435 Mass. 1501 (2001), claiming that he was denied the effective assistance of counsel in two respects: first, that counsel failed to adequately investigate the

defendant's claim that his statements to police were coerced because counsel did not consult with a mental health expert or present expert testimony about the voluntariness of those statements; second, that counsel failed to object to the closure of the court room during *jury empanelment in violation of the defendant's right* to a public trial under the *Sixth Amendment to the United States Constitution.* The motion was bifurcated, and different judges considered, and ultimately rejected, the claims. The denial of the motion was *consolidated with the defendant's direct appeal.*

In his appeal, the defendant asks us to expand our *rule requiring the corroboration of extrajudicial* statements as it applies to juvenile confessions pursuant to our extraordinary power under *G. L. c. 278, § 33E.* He also claims error in (1) the denial of his motion to suppress; (2) the denial of his motion for a *new trial; and (3) the denial of his motion for a directed* verdict on the firearms charge. We affirm the defendant's convictions and decline to grant relief under *G. L. c. 278, § 33E.*

1. *Facts.* We recite the facts in the light most favorable to the Commonwealth, reserving certain details for our analysis of the legal issues raised on appeal.

On August 10, 2003, the victim went to Wendover Street to sell some small jewelry charms to a woman and her children. After the transaction, the woman reentered her home, and the daughter remained outside. The woman heard two gunshots. She stepped back out of the doorway and saw the victim lying in the street on top of his bicycle. The bag in which he had carried the jewelry was gone. The woman went back inside and telephoned 911.

The daughter testified that, just before the shooting, she noticed a group of males of varying ages gathered at the top of Dudley and Wendover Streets. The group rushed toward the victim, who threw his bag on the ground. They began to fight. An older member of the group, who appeared to be about thirty years of age and was wearing a straw hat, threw the first punch. A younger member of the group, who appeared to be about fifteen years of age and was wearing jean shorts and a white "doo-rag," picked up the victim's bag and ran toward Dudley Street. The daughter ran up the steps toward her front door and heard two gunshots fired in quick succession.

A third witness, who lived on nearby Humphreys Street, was sitting outside on his second-floor porch when he heard gunshots from the direction of Wendover Street. He then saw a young black man run down Humphreys Street away from Dudley Street. The young man wore dark jeans and was trying to pull off a dark shirt, under which he wore a white t-shirt. The young man stumbled, hopped, and pulled a pistol from his pants leg. The pistol had a flat handle and a round silver barrel. As he did so, the baseball cap he was wearing fell off of his head. The cap was collected by the police later that evening.

The cap was a Detroit Tigers baseball cap, with a stitched white "D" on the front and what appeared to be hand-drawn or painted white "D" letters on the sides. The police had seen the defendant wearing a cap matching the same description when they spoke to him approximately two weeks before the victim was murdered. Deoxyribonucleic acid (DNA) matching the defendant's DNA profile was found on the hatband. An analyst testified that the possible contributors to the DNA profile found on the hatband were one in 40

billion Caucasians, one in 1.6 billion African-Americans, and one in 65 billion Southeastern Hispanics.

A ballistics expert testified that shell fragments recovered from the victim were consistent with having been fired from a revolver and not a semiautomatic weapon. A revolver has a round barrel, consistent with the description of the handgun in the possession of the fleeing suspect, and does not eject shell casings. No shell casings were recovered from Wendover Street.

When emergency medical services arrived at the scene, the victim showed no signs of life. He had a bleeding head wound with brain matter visible and a second wound to his lower right back. The medical examiner who performed the autopsy on the victim determined that the cause of death was the two gunshot wounds.

At trial, there was a great deal of testimony regarding the investigation leading up to the incriminating statements that the defendant made to police, especially his admission, made after discussing the particulars with his mother, that he "shot the [victim]." The defense strategy was to claim that the defendant's statements were involuntary, and the result of coercion by a combination of lengthy questioning first by police and then by his mother, Iris Weaver (Weaver). We leave the details concerning the questioning of the defendant and the resultant incriminating statements to the discussion of the defendant's motion for a new trial, *infra*, as the trial testimony of the involved police officers and the defendant's mother, viewed in the light most favorable to the Commonwealth, are substantively identical to the testimony given at the evidentiary hearing on the motion.

At the conclusion of the trial, a humane practice instruction was given to the jury. The judge instructed the jury that the Commonwealth bore the burden of proving beyond a reasonable doubt that the defendant made his statement to the police "voluntarily, freely, and rationally." The judge further stated:

> "In order for a statement of a defendant to be voluntary, it must not, in any way, be coerced by physical intimidation or psychological pressure. Under the law of the Commonwealth of Massachusetts, a statement may be coerced not only by law enforcement officials but also by a private citizen. That is, coercion—You may find that the defendant was coerced. Let me put it this way, coercion may occur not only by law enforcement officials, but in order to be coercion, it may also be caused by a private citizen. A statement made by a defendant is not voluntary if it is psychologically coerced. Therefore, if you find that the statement made by the defendant was coerced by his mother or any other person, you may not consider that statement in reaching a verdict."

During deliberations, the jury asked for a legal definition of "psychological coercion." After receiving the question, the court adjourned for the day. Neither the judge nor counsel located any case law defining the term before court reconvened the next morning. The judge then repeated his original instructions to the jury, adding that the jurors should "give the term psychological coercion its plain and ordinary meaning as you understand it. But I will tell you that psychological coercion refers to inappropriate or inordinate psychological pressure." The jury subsequently convicted the defendant.

2. *Discussion.* a. *Corroboration rule.* In *Commonwealth v. Forde, 392 Mass. 453, 458, 466 N.E.2d 510 (1984)*, we announced the corroboration rule, which "requires corroboration that the underlying crime was in fact committed, thus preventing convictions against persons who have confessed to fictitious crimes." *Commonwealth v. DiGiambattista, 442 Mass. 423, 430, 813 N.E.2d 516 (2004)*, citing *Forde, supra at 458.* In *DiGiambattista*, we declined to expand the rule to require corroboration that a defendant was the actual perpetrator of the crime, or to require a showing that a confession is reliable under the circumstances in which it was given. *DiGiambattista, supra at 431-432.* Acknowledging the phenomenon of false confessions, we concluded that the problem is best addressed through the "strict analysis of the circumstances of [an] interrogation as they affect the voluntariness of a defendant's statement." *Id. at 432.*

On appeal, the defendant asks us to reconsider expanding the corroboration rule as it applies to juvenile confessions in light of research that juveniles are more likely than adults to confess to crimes they did not commit—research to which no citation is provided. He argues that his case illustrates the need for an expanded rule requiring additional evidence that the accused perpetrated the crime because although there is no question that a crime occurred—satisfying *Forde*—there is no evidence, aside from the defendant's confession, linking him to it.

We decline to expand the rule on this record. The defendant fails to articulate why our practice of rigorously examining the voluntariness of a defendant's confession is an inadequate prophylactic measure against the use of false confessions in securing a

conviction. Indeed, even if we were to expand the rule, it would not aid the defendant's case. In addition to the defendant's admission, the Commonwealth presented evidence at trial linking the defendant to the murder, including testimony that (1) a young man was seen fleeing from the scene of the shooting; (2) the young man had a firearm fitting the description of a revolver in his possession as he fled; (3) the young man was wearing a distinctive baseball cap, which fell to the ground; (4) the cap belonged to the defendant; and (5) the victim and the defendant were known to each other.

The defendant also asks for unspecified relief under *G. L. c. 278, § 33E*, on the basis that the jury could not properly assess the voluntariness of his admission in this case. We disagree, as the jury heard extensive evidence about the circumstances surrounding the defendant's statements, and were properly instructed on the humane practice rule. We therefore decline to grant relief under *§ 33E*.

b. *Motion to suppress the defendant's statements.* The defendant next asserts error in the denial of his pretrial motion to suppress his statements to the police based on his claim that they were involuntary and coerced. The Commonwealth argues that the defendant waived this argument by failing to brief the issue in accordance with *Mass. R. A. P. 16 (a) (4)*, as amended, 367 Mass. 921 (1975).[1] In his brief, the defendant does

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[1] *Rule 16 (a) (4) of the Massachusetts Rules of Appellate Procedure*, as amended, 367 Mass. 921 (1975), requires that the appellant's argument "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . The appellate court need not pass upon questions or issues not argued in the brief."

not dispute the factual findings of the judge who heard the motion (pretrial motion judge) as to the credibility of witnesses, but the defendant states that he "does dispute the conclusions of law." The defendant then states that he incorporates by reference the authorities cited in the defendant's application to a single justice in the county court for leave to prosecute an interlocutory appeal "in the interests of judicial economy and brevity." The defendant additionally cites to authorities apparently not cited in the prior filings, but does not provide complete citations or any argument as to why those authorities undermine the rulings of the pretrial motion judge.

We agree with the Commonwealth that the defendant's treatment of this issue in his brief does not rise to the level of appellate argument required by *rule 16 (a) (4)* and is therefore technically waived.[2] However, review under *G. L. c. 278, § 33E*, requires us "to consider all issues apparent from the record, whether preserved or not." *Commonwealth v. Randolph, 438 Mass. 290, 294, 780 N.E.2d 58 (2002)*. Thus, we review the denial of the motion to suppress, and if there was error, we determine whether the error created a substantial likelihood of a miscarriage of justice in the verdict. *Id.*

"In reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" *Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233*

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[2] In his reply brief and at oral argument, the defendant argued it was not his intention to waive this claim, but rather incorporated the authority contained in the trial pleadings in the interest of "judicial economy." This contention is unavailing.

(2004), quoting *Commonwealth v. Jimenez, 438 Mass. 213, 218, 780 N.E.2d 2 (2002).*

Following an evidentiary hearing, the pretrial motion judge found the following facts that we conclude are supported by the evidence. In investigating the victim's murder, the detectives initially brought the defendant's older brother, Cassim, to the police station for questioning because they had received information that he had been seen wearing a blue Detroit Tigers baseball cap, similar to the one found near the scene of the shooting. Apparently satisfied that Cassim was not involved in the shooting, he was subsequently dropped off at home by a police officer after the interview. Weaver was upset that Cassim had been taken to the police station.

After speaking with Cassim, the focus of the investigation shifted to the defendant. O'Leary went to the Weaver residence, apologized for bringing Cassim to the police station, and told Weaver that he wanted to speak to the defendant about the victim's murder. Weaver knew the victim and was aware of the shooting. Weaver told the police that the defendant was away at camp and that he would be returning on Sunday, August 24. Weaver and O'Leary agreed that they would meet, with the defendant present, on Monday, August 25.

In the time between speaking with Weaver and the anticipated interview with the defendant, O'Leary learned that the Boston police had arrested the defendant on a drug offense on July 26, 2003. The booking sheet generated after that arrest indicated that the defendant was wearing a Detroit Tigers baseball cap. This baseball cap closely resembled the baseball cap found near the scene of the victim's shooting.

At approximately 8:30 p.m. on August 25, O'Leary returned to the Weaver home with another detective to meet with the defendant. Although Weaver was cordial and respectful, the presence of the detectives in her home caused her to feel very uncomfortable. Weaver had not had any previous contact with the police and she was still upset and concerned about the detectives conducting the interview with Cassim. She invited the detectives to sit at the dining room table, where she and the defendant joined them. At some point during the conversation, Weaver left the table to continue cooking dinner in the adjoining kitchen. The apartment had an open floor plan, and the view from the dining room table to the kitchen was unobstructed.

Before the detectives began questioning the defendant, O'Leary produced a waiver form that contained a printed version of the Miranda warnings especially for juveniles. Upon seeing the form, Weaver asked if it was necessary to give her son the Miranda warnings. O'Leary told her that it was "routine" and then explained that because his purpose was to question the defendant about the victim's shooting, the defendant should be advised of his Miranda rights before any questioning took place. O'Leary first asked the defendant to complete the part of the form containing his personal information. The defendant did so at his mother's direction. O'Leary read each of the rights from the form and then asked Weaver and the defendant if they understood them. He also asked them to initial the form after each warning to indicate that the rights had been explained to them. The pretrial motion judge concluded that Weaver, though not highly educated, is an intelligent woman and understood those rights.

Weaver noticed that the defendant was becoming "aggravated and frustrated" as the rights were being explained. She told him to relax and breathe while encouraging him to sign the form. She and the defendant verbally acknowledged that they understood the rights being explained and initialed the form as requested. Weaver never explained her understanding of these rights to the defendant.

After Weaver and the defendant signed the form, O'Leary told Weaver that she could speak with her son privately. They went to the area near the stairs, away from where they had been sitting. After a few minutes, they returned to the dining room. O'Leary stated that if they understood the rights and if they agreed to speak with the detectives, the defendant should sign the part of the form that acknowledged that he had taken advantage of the opportunity to speak with his mother outside the presence of the police officers. The defendant and his mother signed the form.

The detectives then questioned the defendant about the victim's shooting for about three hours. Weaver occasionally left the table to continue cooking dinner but remained within earshot of the interview at all times. The defendant denied that he was in the area of Wendover Street on the night of the shooting, that he was associated with any of the individuals named by the police, or that he knew about a fight involving the victim and other youths who had accused the victim of stealing a bicycle.

The detectives asked more difficult questions that left no doubt that they suspected the defendant of having been involved in the shooting. The defendant was unaware that the detectives had information that the defendant had fallen from his bicycle the night of the shooting. O'Leary asked the defendant how (not if)

the defendant had hurt his leg; the defendant said that he had injured it playing basketball. Signaling his disbelief, O'Leary asked the defendant if it was possible that he had injured himself by falling off his bicycle the night of the shooting. The defendant denied this, and said whoever said that was lying. When pressed about when the basketball injury occurred, the defendant was unable to specify the date. Weaver volunteered that they had gone to church on August 10 and that the defendant was not limping at that time. After consulting a calendar and reviewing the events of the weeks passed, the defendant said that his injury occurred two days after the shooting.

The detectives then questioned the defendant about his Detroit Tigers baseball cap. The defendant admitted to wearing such a cap when he was arrested on July 26. He also agreed that the cap was distinctive on account of the airbrushed letter "D" on either side of the logo. The defendant said that he had taken the cap to an establishment in downtown Boston to have the distinctive markings placed on it. When asked where the cap was, the defendant stated that it was lost or stolen the same day that he hurt his leg playing basketball. When pressed on the date, the defendant stood by his statement that it was lost on August 12.

O'Leary then told the defendant that a witness had observed a black male matching the defendant's description running from the scene of the shooting and losing a baseball cap that had been recovered by the police. He said that if the defendant was not wearing the cap, then it must have been Cassim. The defendant denied that Cassim was at the scene. O'Leary expressed his confidence that the defendant was present on Wendover Street on August 10 and was involved in the shooting. The interrogation was terminated shortly

thereafter. O'Leary told the defendant that he "needed to know the truth" and that the investigation would continue. O'Leary told Weaver that he did not believe the defendant's story.

Although he made no promises of leniency, O'Leary urged Weaver to "sit down and talk with [the defendant]," "have a heart to heart talk," and "try to figure out" his role in the events of the shooting. O'Leary did not suggest questions to Weaver, but he suspected that the defendant was involved and was hoping for whatever information Weaver could provide to assist in the investigation.

The pretrial motion judge found that neither Weaver nor the defendant asked the detectives to leave their home, nor did they ever request an attorney or seek in any way to terminate the interview. The defendant's demeanor during the questioning was sober and coherent, except for when he seemed to be agitated that the same questions were being asked repeatedly. The defendant did not appear to be under the influence of drugs or alcohol, incapacitated, or incompetent. Although the detective suspected that the defendant was involved in the shooting, he did not have an arrest warrant and Weaver was free to terminate the questioning at any time.

After the detectives left, Weaver began questioning her son. She was upset that the detectives had come to her home and was concerned with some of the defendant's answers to their questions. She was particularly concerned that the defendant's baseball cap may have been found at the scene of the shooting, and she wanted answers from him. The pretrial motion judge found that she was as much concerned with her own need to clarify her son's involvement in a very serious crime as she was with the detective's request that she

speak with the defendant. In her own words, she "wanted to have some peace with this thing." She asked the defendant the same questions that she had heard the detectives asking and did not believe the defendant's answers. After about an hour, she stopped questioning the defendant, and then sat in a chair for most of the night thinking about what had just happened.

O'Leary telephoned Weaver the next morning while she was at work to ask if she had had the "heart to heart" talk with the defendant. Weaver told him that she had not, but would when she got home from work. She did not tell O'Leary about her conversation with the defendant from the night before.

Because she was distracted by the events of the previous evening, Weaver decided to leave work early and arrived home around 10 a.m. She decided to talk with the defendant again because she "didn't have peace with this thing in my mind." After about an hour she stopped questioning him because the questions and answers gave her a headache. About one-half hour later, she called the defendant back to resume her questioning. She brought God into the conversation, and told the defendant that a boy had died and that such a thing could not be a secret between children, that God knew about it, and that the defendant would have no life at all if he did not tell what he knew about the killing. She continued to question him on and off until the late afternoon. In an effort to get the defendant to tell the truth, she resorted to pounding her fist on the kitchen table and gritting her teeth. The pretrial motion judge found that in seeking the truth about the defendant's involvement in the shooting, Weaver was motivated by a desire to do the right thing

in accordance with her personal spiritual beliefs and was not acting as an agent of the police.

Weaver then prayed again and told the defendant she would ask him two questions. She asked if he was in the area when the shooting occurred; the defendant said, "Yes." She then asked if he did it or if he knew who did it. The defendant put his head down but said nothing; Weaver took this gesture to mean "Yes." Weaver, who the pretrial motion judge found to be a woman of sincere and deeply held religious convictions, began to cry and to pray out loud. The defendant's sister came into the house and joined her mother in prayer. Having realized the defendant may have been involved in a murder, Weaver insisted that the defendant had to confess for the good of his soul.

The pretrial motion judge found that the concern and love that Weaver felt for her son expressed itself at this point in her singular focus on his spiritual rather than his legal well-being. She did not give the defendant any advice or counsel that would have made him aware of the need to avail himself of the constitutional protections to which he was entitled. She did not tell the defendant to remain silent but rather advised him to tell the truth to the police. She did not seek legal assistance for her son.

At approximately 4 p.m., Weaver tried to contact O'Leary. He called her back at around 8 p.m. and she told him that she was bringing the defendant to speak with him. O'Leary replied that he assumed the defendant was involved, and Weaver said, "Yes."

In the midst of the talk about God and surrender as the way to salvation, the defendant told his mother that he did not want to go to the police station. In the end, however, he succumbed to his mother's entreaties

that he confess for the good of his soul and turn himself in to the police. Weaver formulated a plan that they would go to the police station, that he would say, "I shot Germaine Rucker," and the detectives would then take him into custody. He was to say nothing more until a lawyer was appointed to represent him. Sometime after midnight on August 27, the Weaver family concluded their prayer session and left their home to go to the police station, which was a short distance away. On the way, they prayed out loud. When they arrived at the station, at approximately 12:30 a.m., they stood together in a circle, praying for the defendant. The defendant was crying. They waited for O'Leary and the other detective to arrive. No police officer had requested that the defendant be brought to the police station.

When the detectives arrived, Weaver told O'Leary that the defendant had something to say to them, that she expected them to take him into custody after his statement, and that she wanted him to have an attorney before they questioned him any further. Realizing that the defendant was about to make an inculpatory statement, O'Leary indicated that he would not take any statement until the defendant was represented by counsel. However, he did not tell the defendant to remain silent until they could arrange for an attorney. At the same time, O'Leary produced a juvenile Miranda form from his briefcase and began reciting the warnings to the defendant. As he did so and before he could finish reading the rights, the defendant said, "I shot Germaine Rucker." O'Leary then arrested the defendant and read him his rights. Until the defendant made the statements, he was free to leave the station.

i. *August 25 statements.* The defendant first argues that the statements made in his home on August 25, 2003, should have been suppressed because he did not validly waive his Miranda rights before speaking with the police and because his statements were not voluntary. Rejecting these contentions, the pretrial motion judge concluded that the Miranda warnings were not required and that the defendant's statements were voluntarily made. We agree.

A. *Custodial interrogation.* Miranda warnings are required only when a defendant is subjected to a custodial interrogation, and "a defendant's failure to receive or understand Miranda warnings, or police failure to honor Miranda rights, does not result in suppression of a voluntary statement made in a noncustodial setting" (citation omitted). *Commonwealth v. Libby, 472 Mass. 37, 40, 32 N.E.3d 890 (2015).* Whether an interrogation is custodial depends on the "objective circumstances of the interrogation, and not on the subjective views of either the interrogating officers or the person being questioned." *Commonwealth v. Sneed, 440 Mass. 216, 220, 796 N.E.2d 1284 (2003).* This inquiry focuses on whether a reasonable person in the defendant's position would believe that his freedom of movement was restricted to the degree associated with formal arrest. *Commonwealth v. Morse, 427 Mass. 117, 123, 691 N.E.2d 566 (1998).* In determining whether a defendant was in custody, the court considers "(1) the place of the interrogation; (2) whether the police conveyed any belief or opinion that the person being questioned was a suspect; (3) whether the questioning is aggressive or informal; and (4) whether the suspect was free to end the interview by leaving the place of interrogation, or whether the interview ended with the defendant's

arrest." *Commonwealth v. Murphy, 442 Mass. 485, 493, 813 N.E.2d 820 (2004).*

We agree with the pretrial motion judge's findings that the environment in which the defendant was questioned was not inherently coercive because it occurred in the defendant's home, on a date and time of his convenience, and in his mother's presence. See *Commonwealth v. Conkey, 430 Mass. 139, 144, 714 N.E.2d 343 (1999), S.C., 443 Mass. 60, 819 N.E.2d 176 (2004)* (interrogation not custodial where defendant allowed police into home to question him). Although the detectives informed the defendant that they believed he was involved in the crime being investigated, they did not coerce or threaten the defendant during the interview, and the defendant and his mother were free to terminate the interview at any time.

We appreciate that Weaver, and not the defendant, invited the detectives into their home and permitted them to conduct the interview. Nonetheless, we agree with the pretrial motion judge that a reasonable person in the defendant's position would not have viewed his questioning as coercive or believed that his freedom of movement was curtailed to the degree of arrest. Accordingly, the Miranda warnings were not required in connection with the August 25 interrogation.

B. *Interested adult.* We also agree with the pretrial motion judge's conclusion that, even if Miranda warnings were required, there is no merit to the defendant's argument that his waiver was invalid because he was not afforded the special protections due to juveniles. "Investigating officials permissibly may interview a juvenile suspected of a crime, and a statement that is the product of that interview, if

knowing and voluntary, may be admitted at trial against the juvenile." *Commonwealth v. Philip S., 414 Mass. 804, 808, 611 N.E.2d 226 (1993).* However, the Commonwealth bears a heavy burden of demonstrating that a defendant knowingly and intelligently waived his or her privilege against self-incrimination. *Commonwealth v. Berry, 410 Mass. 31, 34, 570 N.E.2d 1004 (1991), S.C., 420 Mass. 95, 648 N.E.2d 732 (1995)* Where a defendant is a juvenile, the court proceeds with "special caution when reviewing purported waivers of constitutional rights" (quotation omitted). *Id.* Where a juvenile is at least fourteen years of age, the Commonwealth must demonstrate that prior to waiving his rights, he was given the opportunity to consult with an interested adult who was informed of, and understood, those rights. *Id. at 35.*

In his motion to suppress, the defendant argued that his mother was not an "interested adult" because she did not understand the Miranda warnings and because she felt compelled to sign the waiver and to have the defendant sign the waiver. The defendant also denied having the opportunity to consult with her.

In determining whether an adult is an interested adult, "the facts must be viewed from the perspective of the officials conducting the interview." *Philip S., 414 Mass. at 809.* The court examines whether, at the time of the investigation, "it should have been reasonably apparent to the officials questioning a juvenile that the adult who was present on his or her behalf lacked capacity to appreciate the juvenile's situation and to give advice, or was actually antagonistic toward the juvenile." *Id.* If such facts are present, the court is warranted in finding that the juvenile was not assisted by an interested adult and was not afforded the opportunity for consultation. *Id.*

Here, the pretrial motion judge explicitly found that Weaver understood the Miranda warnings, and we see no grounds to disturb this finding. To the extent that the testimony of Weaver and that of the detectives differed on this point, we note that credibility determinations "are the province of the motion judge." *Commonwealth v. Johnson, 461 Mass. 44, 48, 958 N.E.2d 25 (2011).* Moreover, viewing the circumstances from the perspective of the officers, it appeared that Weaver was an intelligent, responsible adult who cared for her son and was concerned for his welfare. Additionally, the record reflects that Weaver understood why the police were questioning her son, and she remained present or within listening distance throughout the interview. Nor was there any apparent animosity between the defendant and Weaver.

The judge also found that Weaver and the defendant had had a private consultation prior to signing the form and waiving their rights. Even if Weaver and the defendant did not speak during this time, we note that "[i]t is not necessary for such a juvenile actually to consult with the interested adult, for it is the *opportunity* to consult that is critical." *Berry, 410 Mass. at 35.*

Additionally, the motion judge correctly found that Weaver was an interested adult despite encouraging the defendant to speak with the detectives and to tell the truth. "We reject the notion that a parent who fails to tell a child not to speak to interviewing officials, who advises the child to tell the truth, or who fails to seek legal assistance immediately is a disinterested parent." *Philip S., 414 Mass. at 810.* See *Commonwealth v. Quint Q., 84 Mass. App. Ct. 507, 517, 998 N.E.2d 363 (2013)* (mother who advised son to be truthful with police was interested adult despite giving advice that

would not have comported with that of lawyer). In other words, an interested adult is not a proxy for a lawyer. Accordingly, we conclude that the defendant was afforded the protections of the interested adult rule.

C. *Valid waiver.* Even assuming the Miranda warnings were required, we conclude the defendant's waiver of his Miranda rights was valid. In determining whether a waiver is knowing and voluntary, the court examines the totality of the circumstances surrounding the waiver. See *Commonwealth v. Mazariego, 474 Mass. 42, 52-53, 47 N.E.3d 420 (2016).* Factors relevant to this inquiry include "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency . . . and the details of the interrogation, including the recitation of Miranda warnings" (citation omitted). *Commonwealth v. Walker, 466 Mass. 268, 274, 994 N.E.2d 764 (2013).*

The facts support the pretrial motion judge's conclusion that the defendant's waiver was knowing and voluntary. The defendant and his mother were provided with Miranda warnings, which both understood. The interrogation took place in the defendant's home and in the presence of his mother. The record did not show that the defendant's will was overborne by his mother's directions to sign the form. Although the interview lasted some time, the questioning was generally nonaggressive and the police did not make any threats or promises to the defendant. The defendant was young, but was of average intelligence and had had at least one prior experience with the police. His responses to questions were coherent, and

there was no evidence that he was under the influence of alcohol or other substances. Nor did the defendant present any evidence that his mental state was otherwise compromised. The defendant also made several statements aimed at exculpating himself, including stating that he was not at the scene of the shooting and providing an explanation for the injury to his leg. See *Commonwealth v. Vazquez, 387 Mass. 96, 100, 438 N.E.2d 856 (1982)* (exculpatory statements tend to show defendant's statements are voluntary).

D. *Voluntariness.* Due process requires a separate inquiry into the voluntariness of a defendant's inculpatory statements. *Commonwealth v. Siny Van Tran, 460 Mass. 535, 559, 953 N.E.2d 139 (2011).* "A voluntary statement is one that is the product of a rational intellect and a free will, and not induced by physical or psychological coercion" (citation and quotations omitted). *Commonwealth v. Monroe, 472 Mass. 461, 468, 35 N.E.3d 677 (2015).* The court examines the totality of the circumstances to determine whether the defendant's statements were the product of free will and rational intellect and "not the product of inquisitorial activity which had overborne his will" (citation omitted). *Siny Van Tran, supra.* Relevant factors include "the defendant's age, education, intelligence, physical and mental stability, and experience with the criminal justice system." *Id.* Applying these factors to the circumstances, we conclude that the defendant's waiver was knowing and voluntary for largely the same reasons set forth above. Additionally, although the defendant expressed frustration with the questioning, the record does not show that he was agitated or emotionally overwrought. Cf. *Monroe, 472 Mass. at 470-471* (statements coerced where defendant demonstrated disturbed emotional state, was threatened by police and was crying, and was subjected to hostile

interview). Given these circumstances, the pretrial motion judge did not err in concluding that the defendant's statements on August 25, 2003, were voluntary, and not the product of physical or psychological coercion.

ii. *August 27 statement.* The defendant also argues that the motion judge erred in denying his motion to suppress his statement at the police station, "I shot Germaine Rucker," because it was obtained in violation of his Miranda rights and was involuntary. As the pretrial motion judge correctly concluded, the Miranda warnings were not required because the defendant's statement was not the product of interrogation or its functional equivalent by the police. See *Commonwealth v. Gonzalez, 465 Mass. 672, 675, 991 N.E.2d 1036 (2013)* ("term 'functional equivalent' includes 'any words or actions on the part of the police [other than those normally attendant to arrest and custody] that the police should know are reasonably likely to elicit an incriminating response from the suspect'" [citation omitted]). Here, the detective was reciting the Miranda warnings when the defendant made his statement. Although the detectives anticipated that the defendant would make a statement and were therefore providing the Miranda warnings, the statement was not made because of words or actions by the detectives meant to elicit it.

A. *Agent of the police.* The defendant also argues that his statement should have been suppressed because his mother acted as an agent of the police when she brought him to the police station to make the statement. A private party is considered a State agent when government officials prompt the party to act or participate with the party in an action which they themselves could not have legally engaged. *Common-*

wealth v. Jung, 420 Mass. 675, 686, 651 N.E.2d 1211 (1995). An individual is not a State agent if no promises are made in exchange for the individual's help and if nothing was offered or asked of that individual. *Commonwealth v. Reynolds, 429 Mass. 388, 393, 708 N.E.2d 658 (1999)*, quoting *Commonwealth v. Harmon, 410 Mass. 425, 428, 573 N.E.2d 490 (1991)*. Here, the detectives urged Weaver to have a heart to heart conversation with her son to determine whether he participated in the shooting, and although he followed up on this request with a telephone call to Weaver, he did not otherwise make any threats or promises to obtain her assistance. Additionally, the detectives do not appear to have been trying to gain information through Weaver that they could not otherwise legally obtain themselves, especially where the defendant voluntarily submitted to questioning about the shooting. Moreover, the pretrial motion judge's finding that Weaver aggressively questioned the defendant out of her desire to do what was right in accordance with her personal spiritual beliefs undercuts the defendant's argument. See *Commonwealth v. Foxworth, 473 Mass. 149, 158, 40 N.E.3d 1003 (2015)*; *Reynolds, 429 Mass. at 393* (individual who has not entered into agreement with government or who reports incriminating evidence to police out of conscience not acting as government agent [quotation and citation omitted]). We therefore reject the defendant's contention that Weaver was acting as an agent of the police in encouraging the defendant's confession.

B. *Voluntariness*. We lastly consider the defendant's argument that his statement at the police station was involuntary and the product of coercion by his mother. "[U]nder the law of this Commonwealth, a judge must determine the voluntariness of statements

extracted by private coercion, unalloyed with any official government involvement" (quotation and citation omitted). *Commonwealth v. Paszko, 391 Mass. 164, 176-177, 461 N.E.2d 222 (1984).* "[A] statement obtained through coercion and introduced at trial is every bit as offensive to civilized standards of adjudication when the coercion flows from private hands as when official depredations elicit a confession" (citation omitted). *Commonwealth v. Allen, 395 Mass. 448, 455, 480 N.E.2d 630 (1985).* Accordingly, our inquiry is governed by the same analysis delineated above regarding the voluntariness of the defendant's August 25 statements.

The defendant argues that his mother coerced his August 27 confession by relentlessly questioning him for two days about his involvement in the shooting, by demanding that he tell the truth, and by making him feel guilty by praying and invoking God and the need to "be at peace," and by forcing him to travel to the police station to confess. It is well-settled that a defendant may offer evidence that a relative's involvement in questioning about a crime is coercive. See *Commonwealth v. McCra, 427 Mass. 564, 569, 694 N.E.2d 849 (1998); Commonwealth v. Adams, 416 Mass. 55, 60-61, 617 N.E.2d 594 (1993).* The pretrial motion judge concluded that although Weaver's exhortations played a major role in the defendant's decision to confess, the circumstances of the confession did not evidence that the defendant's will was overborne to the extent that he lost his ability to make an independent decision. Cf. *Commonwealth v. Burgess, 434 Mass. 307, 314, 749 N.E.2d 112 (2001)* (police may "broadly" suggest that it would be best for suspect to tell truth); *Commonwealth v. Cunningham, 405 Mass. 646, 658, 543 N.E.2d 12 (1989)* (defendant's statement, prompted by urging of police and priest that it would

be best to tell truth, not psychologically coerced where defendant made voluntary decision to make statement, in part to unburden troubled conscience); *Philip S., 414 Mass. at 813* (court declined to consider requests that juvenile tell truth as coercive practice).

We agree with the pretrial motion judge's findings that the defendant was not physically or psychologically coerced by his mother and her religious beliefs such that he could not resist her pleas that he tell the truth. The defendant and his family prayed at the police station, and the defendant cried, but he was not otherwise overwrought such that his statement was not the product of free will and a rational intellect. Moreover, the defendant does not argue that his mother's efforts to get him to confess were an improper appeal to his religious beliefs. In fact, the record does not demonstrate whether the defendant held the same beliefs as his mother. Cf. *United States v. Miller, 984 F.2d 1028, 1032 (9th Cir.)*, cert. denied, *510 U.S. 894, 114 S. Ct. 258, 126 L. Ed. 2d 210)*; *Mersereau v. State, 2012 WY 125, 286 P.3d 97, 115 (Wyo. 2012)* (court considered whether appeal to suspect's religious beliefs was unduly coercive). Nor did his mother, in invoking God, indicate that the defendant would be treated more leniently if he confessed. We thus conclude that Weaver's questioning of the defendant did not rise to the level of improper psychological coercion that would render his statement involuntary, and the defendant's confession on August 27 was a free and voluntary act.

Accordingly, we conclude that the judge did not err in denying the defendant's pretrial motion to suppress on the various grounds asserted by the defendant.

c. *Ineffective assistance of counsel.* i. *Mental health expert.* The defendant argues that the judge who heard one portion of his motion for a new trial (first new trial

motion judge)[3] erroneously denied that portion of the motion, which was based on the failure of the defendant's trial counsel to investigate the defense of psychological coercion adequately by not consulting with a mental health expert or presenting expert testimony about the voluntariness of the defendant's confession at either the suppres- sion hearing or at trial.[4] The defendant also contends that the first new trial motion judge erred because he failed to distinguish between testimony concerning the voluntariness of a statement and the phenomenon of false confessions. We conclude that the motion was properly denied, although for reasons different than those stated by the judge.

In a written memorandum of decision and order issued after three days of evidentiary hearings, the first new trial motion judge made the following findings of fact.[5] The defendant's trial counsel is a very

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[3] In his motion for a new trial, the defendant asserted two bases for ineffective assistance of counsel. Because the trial judge had retired, the issues were bifurcated and decided by judges other than the trial judge.

[4] The defendant initially argued that trial counsel should have consulted with an expert and presented expert testimony on the existence and etiology of false confessions, in addition to expert testimony on the issue of voluntariness. On appeal, the defendant abandons this argument and acknowledges we have not yet ruled such evidence admissible. *Commonwealth v. Hoose, 467 Mass. 395, 419, 5 N.E.3d 843 (2014).*

[5] Because the judge who heard this portion of the defendant's motion for a new trial (first new trial motion judge) drew facts about the murder, investigation, and defendant's admission from those found by the judge had who presided over the defendant's pretrial motion to suppress, we do not repeat them here. Insofar as relevant here, the first new trial motion judge based his additional findings on the affidavits and testimony of the

experienced and highly regarded defense attorney. He has practiced law for over forty years and handled over one hundred murder trials at the trial and appellate level. Because the defendant was sixteen years of age, trial counsel spent a great deal of time speaking with the defendant's mother about the circumstances surrounding the defendant's statements to her, and formulated the defense that the police used Weaver as their agent to induce the defendant to admit his involvement in the homicide. Trial counsel moved to suppress the defendant's August 27, 2003, statement to the police on that ground, as well as on the ground that Weaver failed to act as an interested adult for her son by impermissibly pressuring him to confess to the police.

Trial counsel testified that he prepared a defense by learning the facts of a case and then, starting from scratch, researching the law as it related to the issues presented. The judge found that at the time trial counsel litigated the motion to suppress and tried the case, he had researched but was not aware of any appellate or trial court decisions permitting expert testimony on claimed coerced or false confessions.[6]

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defendant's trial counsel and Dr. Frank DiCataldo, a psychologist whom the defendant had retained, as well as the affidavits of the defendant and his mother, Weaver. The affidavits submitted by the defendant and Weaver reiterated that the defendant's statements were not the product of his free will, but rather were coerced by Weaver.

[6] The first new trial motion judge noted that trial counsel had defended one case where a codefendant's request to present expert testimony on coerced and false confessions was denied because it failed to satisfy the standards of expert testimony, and that the ruling was affirmed on appeal. See *Commonwealth v. Robinson, 449 Mass. 1, 5-7, 864 N.E.2d 1186 (2007)*. Trial counsel acknowledged he would have been aware of the decision.

According to trial counsel, there was no strategic reason not to consult with or present an expert on psychological coercion and, given the nature of the defense, it would not have harmed the defense to do so.

In connection with the motion for a new trial, Dr. Frank DiCataldo, a forensic psychologist, examined the defendant and testified at the evidentiary hearing. DiCataldo did not find any evidence that the defendant suffered from any significant cognitive limitations and did not detect any signs of mental illness. After administering two psychological tests, interviewing the defendant, and gaining an understanding of the defendant's family dynamics, DiCataldo opined that by virtue of a protracted investigation by his mother, the defendant's admissions were not the product of his own free will or rational intellect. DiCataldo acknowledged that the basis for his opinion was limited because he had never evaluated a voluntariness claim where the asserted coercive force was a parent, or where the statement was made ten years prior to the evaluation. DiCataldo also acknowledged that neither of the tests he administered to the defendant was specifically focused on juveniles and that there are no specific psychological tests to determine whether a person's will has been overborne.

Applying the standard set forth in *Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974)*, the first new trial motion judge denied the defendant's motion. In doing so, he rejected the defendant's claim that trial counsel was ineffective for failing to consult with an expert witness. The judge found that it was more likely than not that trial counsel was aware of the absence of Massachusetts case law permitting expert testimony on the psychology of coerced and false

confessions, and did not consult an expert because it would not have added value to the defense.

The judge further concluded that the defendant failed to satisfy the prejudice prong of a *Saferian* analysis because he could not demonstrate, as a threshold matter, that DiCataldo's testimony would have been admissible under the foundational requirements of *Mass. G. Evid. § 702(b) (2016)*. Additionally, the judge found that the parent-child dynamic is so generally familiar to a fact finder that expert testimony was not required to further illuminate the issue for a jury. Moreover, the psychological influences of a parent on her child are categorically different from those of other authority figures, such as the police. Thus, the judge found, DiCataldo's reliance on scientific research involving the impact of psychologically coercive or manipulative techniques by police to obtain a statement do not provide a basis for his opinion that, in this case, the defendant was coerced by his mother's conduct. The judge concluded that because DiCataldo's proffered testimony was inadmissible under *§ 702(b)*, trial counsel's failure, either to consult an expert or attempt to present expert testimony, could not have prejudiced the defendant's case.

Where a defendant has been convicted of murder in the first degree, the court evaluates a claim of infective assistance claim to determine whether "there exists a substantial likelihood of a miscarriage of justice," *Commonwealth v. Williams, 453 Mass. 203, 204, 900 N.E.2d 871 (2009)*. The court asks "[1] whether there was an error in the course of trial (by defense counsel, the prosecutor, or the judge), and, [2] if there was, whether that error was likely to have influenced the jury's conclusion" (citation omitted). *Commonwealth v. Lang, 473 Mass. 1, 19, 38 N.E.3d 262 (2015)* (Lenk, J.,

concurring). This standard is more favorable than the constitutional standard for determining ineffectiveness of counsel. *Commonwealth v. Gonzalez, 443 Mass. 799, 808, 824 N.E.2d 843 (2005).* The court considers the defendant's claim "even if the action by trial counsel does not constitute conduct 'falling measurably below that . . . of an ordinary fallible lawyer'" (citation omitted). *Id. at 808-809.*

Where a defendant challenges tactical or strategic decisions by trial counsel, the court will find ineffective assistance "only if such a decision was manifestly unreasonable when made." *Commonwealth v. Diaz, 448 Mass. 286, 288, 860 N.E.2d 665 (2007).* However, the "manifestly unreasonable standard" only applies "where the attorney's purportedly constitutionally ineffective conduct involved a strategic decision, rather than some other claimed inadequacy such as a lack of appropriate investigation or preparation by defense counsel." *Lang, 473 Mass. at 20* (Lenk, J., concurring), citing *Commonwealth v. Martin, 427 Mass. 816, 822, 696 N.E.2d 904 (1998).*

In *Lang*, trial counsel was aware of the defendant's psychiatric history but chose to pursue another defense without investigating a criminal responsibility defense. *Lang, 473 Mass. at 11-12* (Hines, J., concurring). A majority of justices concurred that the "manifestly unreasonable standard" did not apply in these circumstances because "strategic choices made after less than complete investigation are reasonable [only] to the extent that reasonable professional judgments support the limitation on investigation." *Id. at 19* (Lenk, J., concurring), quoting *Commonwealth v. Baker, 440 Mass. 519, 529, 800 N.E.2d 267 (2003).* Although *Lang* and the cases cited therein relate to the adequacy of an investigation into a lack of criminal

responsibility defense, these cases provide a useful framework for evaluating the defendant's claim.

Here, the first new trial motion judge found that there was no evidence showing that trial counsel's failure to consult with a mental health expert was a lapse rather than a reasoned decision. This finding was confined to trial counsel's investigation into case law permitting expert testimony on psychological coercion as it related to false confessions and did not address trial counsel's strategy with respect to expert testimony about voluntariness. We therefore assume without deciding that trial counsel's failure to consult with a mental health expert was not a strategic or tactical decision and thus manifestly unreasonable. Accordingly, we ask only whether the failure to consult a mental health expert or to present expert testimony at trial as to the voluntariness of the defendant's statements "was likely to have influenced the jury's conclusion." *Commonwealth v. Wright, 411 Mass. 678, 682, 584 N.E.2d 621 (1992), S.C., 469 Mass. 447, 14 N.E.3d 294 (2014).*

In order to carry his burden of demonstrating that the expert consultation and testimony would have accomplished something material for the defense, *Commonwealth v. Bell, 460 Mass. 294, 303, 951 N.E.2d 35 (2011),* the defendant, as a threshold matter, must demonstrate that DiCataldo's testimony would have been admissible. The first new trial motion judge correctly concluded that DiCataldo's testimony regarding a child's susceptibility to parental coercion generally or the defendant's susceptibility to coercion by his mother would not have been admissible.

Section 702 of the Massachusetts Guide to Evidence, regarding the admission of expert testimony, provides:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if
>
> "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> "(b) the testimony is based on sufficient facts or data;
>
> "(c) the testimony is the product of reliable principles and methods; and
>
> "(d) the expert has reliably applied the principles and methods to the facts of the case."

Mass. G. Evid. § 702 (2016).

DiCataldo's evaluation of the defendant was based on his assessment of the defendant through the administration of psychological tests and information provided by the defendant and his mother. The first new trial motion judge noted that the facts relied on by DiCataldo were substantially different from those presented at the hearing on the motion to suppress and found by the pretrial motion judge. Additionally, DiCataldo created his own methodology for forming an opinion about the voluntariness of the defendant's statement because he was not aware of any peer-reviewed or generally accepted methodology within the psychological community that would apply to the circumstances in this case.

We have explained that "expert testimony is sufficiently reliable if the underlying theory or methodology is either (1) generally accepted in the relevant scientific community; . . . or (2) satisfies the alternative

requirements adopted in [*Commonwealth v. Lanigan, 419 Mass. 15, 24-26, 641 N.E.2d 1342 (1994)*]" (citation omitted). *Commonwealth v. Shanley, 455 Mass. 752, 761-762, 919 N.E.2d 1254, (2010).* The defendant claims that he demonstrated the admissibility of DiCataldo's testimony by establishing general acceptance in the psychological community. We disagree.

First, the defendant relies on the false logic that because DiCataldo has rendered his expert opinion in other cases in the Commonwealth, his opinion was admissible in this case. We reject this unsubstantiated statement. The defendant does not point to a single case where DiCataldo testified about the coercion of a child by a parent.

The defendant further argues that the first new trial motion judge erred in ruling that DiCataldo's testimony was inadmissible because the courts of the Commonwealth have long recognized that a defendant is entitled to present expert testimony by a mental health expert regarding the voluntariness of a statement, that trial counsel should have sought expert testimony in light of this precedent, and that such testimony is admissible. The defendant cites to several cases to illustrate this point. Notably, in each of these cases, the proffered expert testimony related to a mental impairment that called into question the voluntariness of the defendant's statements. See, e.g., *Commonwealth v. Boyarsky, 452 Mass. 700, 713, 897 N.E.2d 574 (2008)* (panic disorder); *Commonwealth v. Crawford, 429 Mass. 60, 67, 706 N.E.2d 289 (1999),* overruled on another ground by *Commonwealth v. Carlino, 449 Mass. 71, 865 N.E.2d 767 (2007)* (battered woman's syndrome and posttraumatic stress disorder); *Commonwealth v. Monico, 396 Mass. 793, 798-799, 488 N.E.2d 1168 (1986)* (head trauma that impacted

voluntariness of statements and raised question of criminal responsibility); *Commonwealth v. Daniels, 366 Mass. 601, 608, 321 N.E.2d 822 (1975)* (intellectual disability); *Commonwealth v. Harrison, 342 Mass. 279, 289, 293, 173 N.E.2d 87 (1961)* (head trauma, mental illness, personality disorder, "defective intelligence," psychosis); *Commonwealth v. Banuchi, 335 Mass. 649, 655-656, 141 N.E.2d 835 (1957)* (effect of sudden deprivation of alcohol on mental capacity of confirmed alcoholic).

The defendant argues that in rejecting DiCataldo's testimony as inadmissible, the first new trial motion judge effectively concluded that psychology as a science was incapable of yielding reliable admissible evidence probative of a statement's voluntariness. The defendant's characterization of the judge's ruling is unfounded. Rather, our case law demonstrates that when expert testimony as to a novel or developing area of science is offered, the court carefully considers whether it is "sufficiently reliable to reach the trier of fact." *Shanley, 455 Mass. at 761.* See, e.g., *Commonwealth v. Hoose, 467 Mass. 395, 419, 5 N.E.3d 843 (2014); Crawford, 429 Mass. at 67.*

In addition to determining the reliability of an expert's proffered testimony, "[t]he judge must also determine whether the reasoning or methodology can be applied to the facts in issue—that is, whether there is a proper 'fit' between the two." *Shanley, 455 Mass. at 761 n.13.* Here, DiCataldo, in addition to employing a one of a kind methodology to evaluate the defendant, relied on research involving the impact of psychologically coercive or manipulative techniques by police to obtain a statement to evaluate whether the defendant had been coerced by his mother. Not only is this reasoning a poor "fit," but it also depends on expert

testimony on false confessions, which we have not yet ruled admissible. *Hoose, 467 Mass. at 419.*

Similarly misplaced is the defendant's reliance on our decisions in *Commonwealth v. Jackson, 471 Mass. 262, 264 n.5, 28 N.E.3d 437 (2015)*, cert. denied, *136 S. Ct. 1158, 194 L. Ed. 2d 187 (2016)*, and *Adams, 416 Mass. at 61*, where expert testimony was admitted to aid the jury in assessing the voluntariness of a juvenile's statements. In *Jackson, supra at 264 n.5*, the voluntariness of the defendant's statements to the police was an important issue at trial. The defendant called a clinical psychologist to testify "about his examination of the defendant and his opinion with regard to the defendant's susceptibility to being influenced by persons in authority like the police." *Id.*

While these facts are superficially similar to the defendant's case, there are important distinctions to be drawn. Although the admissibility of the expert testimony was not at issue in our decision in *Jackson*, our review of the record before the court in that case reveals that the defendant was evaluated by the clinical psychologist because there was a question of criminal responsibility and competency to stand trial. The psychologist conducted a forensic mental health assessment of the defendant, which included extensive investigation into the defendant's past as well as interviews and a number of psychological assessment tests of the defendant. He testified that the defendant suffered from attention deficit disorder and dependent personality disorder, and that these conditions made him more susceptible to being influenced by people in positions of authority. The methodology used by the psychologist and its application to the facts in *Jackson* were profoundly different from those used by Di-Cataldo. Moreover, the defendant in *Jackson, 471*

Mass. at 264 n.5, presented evidence that it was his mental health impairments that made him more susceptible to pressure by authority figures. Here, the defendant sought to present evidence that his will was simply overborne by his mother. These inquiries are fundamentally distinct.

Similarly, in *Adams, 416 Mass. at 60-61*, we held that it was error to exclude testimony from the defendant's mother and a forensic psychiatrist tending to show that the defendant had been coerced into confessing by the presence of his mother. Although we do not know the methodology employed by the psychiatrist in evaluating Adams, it is apparent from the unpublished memorandum and order that the Appeals Court issued pursuant to its *rule 1:28* following Adams's retrial that there was a contention that his intellectual abilities or disabilities may have affected the voluntariness of his statement. As discussed earlier, while we regularly admit expert testimony regarding the voluntariness of a statement where the defendant suffers from a mental impairment or mental health issue, there is no evidence that the defendant here had cognitive limitations or suffers from a mental illness that would affect his capacity to make a voluntary statement.

Finally, we agree with the first new trial motion judge's determination that the parent-child dynamic is generally familiar to a fact finder, and that the likelihood of a child being influenced by a parent is not a matter outside the common understanding of the average juror, nor is the proposition that a parent may exert pressure on his or her child a novel one. Thus, the jury's evaluation of whether the defendant's statements were psychologically coerced by his mother "could be accomplished through its common under-

standing without need of expert testimony." *Commonwealth v. Bly, 448 Mass. 473, 496, 862 N.E.2d 341 (2007).*

Our conclusion that DiCataldo's testimony would not have been admissible at trial does not foreclose a defendant from presenting expert testimony regarding coercion and voluntariness. "Determining whether . . . scientific testimony is reliable often will hinge on the presentations made by the parties in a particular case . . . and these determinations may vary appropriately on a case-by-case basis." *Canavan's Case, 432 Mass. 304, 312, 733 N.E.2d 1042 (2000).* In this case, the defendant failed to show that the methodology used by DiCataldo would be generally accepted by the scientific community or was otherwise admissible under the factors articulated in *Lanigan*. Because the testimony would not have been admissible at the defendant's trial, we cannot conclude that it would have accomplished something material for the defense such that the jury verdict would have been different. Accordingly, the defendant's claim of ineffective assistance must fail.

ii. *Public trial.* The defendant next claims error in the denial of the portion of his motion for a new trial that rested on the ground that his trial counsel was ineffective for failing to object to the closure of the court room during the entirety of jury empanelment.

After an evidentiary hearing, the judge who heard this portion of the motion (second new trial motion judge) issued a written memorandum of decision in which she found the following facts, which are supported by the evidence. Jury selection spanned two days. The approximately ninety venire members made the court room very crowded. They took every available seat, and those who could not find seats stood wherever

they could. On the first day of empanelment, a court officer informed the defendant's mother and those accompanying her that the court room was "closed for jury selection." They were also denied entry the second day of empanelment for the same reason. Trial counsel lodged no objection.

The second new trial motion judge concluded that the sole reason that a court officer closed the court room to the defendant's family and other members of the public was the crowded condition. The judge found that facts surrounding the empanelment did not satisfy the criteria articulated in *Waller v. Georgia, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*, that may justify a court room closure, but concluded that the closure did not prejudice the defendant's case, and accordingly denied the motion.

A violation of the *Sixth Amendment* right to a public trial constitutes structural error. See *Commonwealth v. Jackson, 471 Mass. 262, 268, 28 N.E.3d 437 (2015)*, citing *United States v. Marcus, 560 U.S. 258, 263, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010)*. We agree with the second new motion judge's conclusion that the closure was a full, rather than partial, closure of the court room. See *Commonwealth v. Cohen (No. 1), 456 Mass. 94, 111, 921 N.E.2d 906 (2010)*; *Commonwealth v. Lavoie, 80 Mass. App. Ct. 546, 551-552, 954 N.E.2d 547 (2001), S.C., 464 Mass. 83, 981 N.E.2d 192*, cert denied, *133 S. Ct. 2356, 185 L. Ed. 2d 1080 (2013)*.

Where a meritorious claim of structural error is timely raised, the court presumes "prejudice, and reversal is automatic." *Jackson, 471 Mass. at 268*, quoting *Commonwealth v. LaChance, 469 Mass. 854, 856, 17 N.E.3d 1101 (2014)*, cert. denied, *136 S. Ct. 317, 193 L. Ed. 2d 227 (2015)*. However, the right to a public trial can be waived in some circumstances.

Jackson, supra. "[W]here the defendant has procedurally waived his *Sixth Amendment* public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply." *LaChance, supra at 856.*

The defendant did not raise an objection to the court room closure because his attorney did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings. The second new trial motion judge's analysis, which anticipated the rule announced in *LaChance, supra*, correctly determined that counsel's inaction was the product of "serious incompetency, inefficiency, or inattention to the defendant's *Sixth Amendment* right to a public trial, and was not objectively reasonable," but that the defendant otherwise failed to show that trial counsel's conduct caused prejudice warranting a new trial.

On appeal, the defendant does not dispute that he failed to demonstrate prejudice, but rather asks us to revise the *LaChance* rule and instead hold that that a defendant who raises an ineffective assistance of counsel claim and has established that, in failing to object to a court room closure, counsel's performance fell below that of an ordinary fallible attorney is entitled to a presumption of prejudice. See *LaChance, supra at 860-868* (Duffly, J., dissenting). We decline to do so.

Moreover, the defendant has not advanced any argument or demonstrated any facts that would sup-

port a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice. Relief is therefore not warranted under *G. L. c. 278, § 33E*, and the denial of the motion for a new trial is affirmed.

d. *Firearms conviction.* The defendant lastly asks the court to vacate his firearms conviction on the grounds that the Commonwealth presented no evidence that he lacked the required firearms licenses, and thus failed to prove beyond a reasonable doubt that he did not have a license to carry. Contrary to the defendant's assertion, lack of license is not an element of unlicensed possession, but rather an affirmative defense. *Commonwealth v. Allen, 474 Mass. 162, 174, 48 N.E.3d 427 (2016)*, and cases cited. Accordingly, the defendant bore the burden of producing evidence that he held a license, and he failed to carry that burden.

e. *Review under G. L. c. 278, § 33E.* We have reviewed the record in accordance with *G. L. c. 278, § 33E*, and we discern no basis on which to reduce the verdict of murder in the first degree or to order a new trial. The defendant's convictions are affirmed. Based on the record before us, it appears that the defendant is entitled to the benefit of a corrected mittimus to reflect that his life sentence under *G. L. c. 265, § 2*, carries with it the opportunity for parole consideration after fifteen years because he was a juvenile at the time of his conviction. See *Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 673, 1 N.E.3d 270 (2013), S.C., 471 Mass. 12, 27 N.E.3d 349 (2015)*, and *Commonwealth v. Brown, 466 Mass. 676, 688-689, 1 N.E.3d 259 (2013), S.C., 474 Mass. 576 (2016)*. The matter is accordingly remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CRIMINAL NO. 2003-11293

COMMONWEALTH

vs.

KENTEL MYRONE WEAVER

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

INTRODUCTION

On April 26, 2006, a Suffolk County jury convicted the defendant, Kentel Myrone Weaver, on indictments charging first-degree murder in violation of G. L. c. 265, § 1 (Count 1), and possession of a firearm without a license in violation of G. L. c. 269, § 10(a) (Count 2). The trial judge, Neel, J., sentenced the defendant to a mandatory life term at MCI Cedar Junction on the murder conviction and a concurrent term of one year to one year and one day on the firearms conviction.

On June 1, 2011, following some delay in procuring the trial transcript, the defendant filed this Motion for New Trial alleging ineffective assistance of counsel based on trial counsel's failure to challenge the voluntariness of his confession and a violation of his Sixth Amendment right to a public trial. The defendant claims that the courtroom was closed to his family and other interested persons during jury selection. The parties agreed to a bifurcated review of the Motion for

New trial, focusing first on the public trial issue. For the reasons explained below, the motion is **DENIED**.

BACKGROUND

The following findings of fact are based on my review of the transcript of the empanelment proceedings, along with the credible evidence and reasonable inferences from testimony offered at the motion hearing.

A. Transcript of the Empanelment Proceedings

Jury selection began on Friday, April 7, 2006 in Courtroom 1015 of the Suffolk Superior Courthouse. Approximately ninety persons were assembled as members of the venire. The courtroom was crowded and every available seat was taken. Those members of the venire who could not be accommodated in available seats stood wherever they could find an open space around the courtroom. After the venire was sworn, the court addressed the crowding issue and explained the procedure as follows:

> If anybody has difficulty hearing me as we go along, please raise your hand and I'll be sure to speak up. There are a number of you who are standing and I apologize for that. The courtroom is almost but not quite large enough to accommodate everyone, and fairly shortly, as we move through the process, seats will open up for those of you who are standing and be sure to take those seats. But in the meantime, if anyone who's standing up needs to sit down, for whatever reason, just let the court officer know and we'll be sure to find a seat for you . . . I think for now, we will let everybody stay

> where they are. We won't have the jurors who are in the juror box stand and move to the back of the room because of circumstances that will become apparent in a minute. So we will - as I say, those of you who have been standing now for some period of time, people will be standing up hopefully and coming forward, if they're not already standing, and so what will happen is that [the clerk] will call individuals by panel and seat number and by name. If you hear your name and your panel and seat number, you should stand up, if you're not already standing, say here or present in a loud, clear voice so that our court reporter can record that you are here with us . . . and then come forward where I will talk with you a little for a few minutes at the side of the bench. As before, ladies and gentlemen, when seats open up, please take them if you are standing, and if any of you needs to sit down, let the officer know and we'll find a chair for you.

After the general inquiry, those standing were taken into the hall outside the courtroom to wait for open seats. The court then conducted individual voir dire of five prospective jurors, selecting only one juror, before recessing the proceedings for the day. The remaining members of the venire were instructed to return on Monday to continue the empanelment.

The following Monday, April 10, 2006, the empanelment continued in Courtroom 914 with the remainder of the venire. At the beginning of the process, the court noted that there are "roughly 90 individuals out in the hall waiting for us to resume our empanelment." The transcript does not reflect whether the entire venire was brought into the courtroom

before the empanelment continued. It appears, however, that the court repeated the procedure used on the first day of empanelment, instructing those members of the venire without seats in the courtroom to wait in the hall. Ten additional jurors were selected, bringing the total to eleven. As jurors were selected, they were seated in the jury box and remained in the courtroom throughout the process. After the morning recess, the court summoned the entire venire to the courtroom and addressed them as follows:

> I just want to say a word to those who have been -- to all of you who have been waiting out in the hallway, thank you for your patience. It's not the most comfortable place to wait and it allows us to get people seated in here where we have seats, but we're using the jury box now so we couldn't have people in there. So I kindly thank you for your patience. We'll continue calling individuals one by one as we go through this process.

From these remarks, I infer that the crowding had not abated sufficiently to allow the entire venire to be accommodated in the courtroom.

As the court prepared to resume the empanelment after the morning recess, the assistant district attorney alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom.

> Judge, just before when I believe you mentioned the out in the hallway when I was leaving the courtroom at the break, and I had shared this with Mr. Davis, I saw at least one member of the defendant's family outside, seated amongst all the prospective jurors. He

> was with two or three other individuals. My assumption is that they have some relation to the defendant. I don't know -- it's impossible for people to be in two places at once, and obviously none of the staff knew that had no reason to know, but this person testified on the grand jury, he testified at the Motion to Suppress. He's a trial witnesses' boyfriend, his name is Paul Smith. I just don't think it's appropriate that he be out in the hallway with any other friends or associates of the defendant. We've taken some steps to make sure that none of the victim's family is up here, although certain one of them are and they're down on the sixth floor, and I would just ask that we take what steps we can just to clear the hallways so we don't have any more issues than we already have to deal with.

Nothing in the record, however, suggests any safety or jury-tampering issue involving Mr. Smith or the other persons outside the courtroom. Nor did any party or the court voice any concern that the defendant's family was outside rather than inside the courtroom. Rather, the assistant district attorney's statement reflects a level of discomfort with their presence, even outside the courtroom. Echoing that point of view, defense counsel stated "If you want me to go out there and tell him to pick some other floor, I'd be glad to."[1] Jury

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[1] Counsel's response is consistent with his affidavit and hearing testimony that he believed that exclusion of the public from empanelment was constitutional. Prior to the Supreme Judicial Court's decision in Commonwealth v. Cohen, 456 Mass. 94, 116 (2010), the custom and practice of closing the courtroom to the public during empanelment, especially in murder cases, was prevalent. See, e.g., Commonwealth v. Shaheen, Memorandum

selection continued and one more juror was selected before the lunch break.[2] By that time, the venire was exhausted and the court ordered a new venire to select the last three jurors.

After the lunch break, the empanelment resumed with a fresh venire. The record does not reflect the number of prospective jurors brought to the courtroom for this third round of the empanelment. Based on the court's remarks to the venire, however, it appears that the courtroom was still crowded, though perhaps less so than earlier in the empanelment. At the conclusion of the general inquiry, the court explained that each prospective juror would be questioned individually and addressed the venire as follows:

> Ladies and gentlemen, that completes my questions to you. At this point I'm going to ask the officers to have those of you who were in the jury box stand and go to the back of the room and fill in whatever seats there are. If there are not enough seats and you're required to stand, seats will open up fairly quickly. But, if you need to sit down before that happens, don't be shy. Let us know and we will find a seat quicker.

During this final empanelment session, the remaining three jurors were selected. The empanelment tran-

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and Order Pursuant to Rule 1:28, 82 Mass. App. Ct. 1104, 2012 WL 2440006, at *1 (Jun. 28, 2012); Commonwealth v. Lavoie, 80 Mass. App. Ct. 546, 548, 552 (2011), *rev'd on other grounds*, 464 Mass. 83 (2013); Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 435 (2011); Commonwealth v. Greineder, 458 Mass. 207, 226 (2010), *cert. granted and judgment rev'd*, 133 S. Ct. 55 (2012); Cohen, 456 Mass. at 102 & n12.

[2] One juror was excused, requiring the selection of three additional jurors.

script does not record any formal courtroom closure order, either verbal or written, or any objection to a closure order. Accordingly, I find that there were none. I also find that there were no "closed" signs posted on or about the courtroom doors and that the doors were never locked. At no time during the empanelment, did the court or court officers announce the availability of seats to those persons outside the courtroom.

B. Post-Trial Hearing[3]

Beginning on March 26, 2012, this court conducted an evidentiary hearing addressed solely to the courtroom closure issue. The defendant offered the testimony of his mother, Iris Weaver, Salvation Army Major Susan Dunigan and his trial attorney, Willie J. Davis. The Commonwealth called various court officers and two Boston police officers assigned to the case as homicide investigators.

On the first day of empanelment, the defendant's mother and other interested persons appeared at the courthouse to observe the trial proceedings. Ms. Weaver and Major Dunigan attempted to enter the courtroom to observe the empanelment but they were denied entry. A court officer told Ms. Weaver that the courtroom was "closed for jury selection." Although Ms. Weaver could not precisely describe this individual, she believed that the person was a white female.[4] She did not see any signs posted on the door or elsewhere

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[3] The trial judge, who has since retired from the bench, submitted an affidavit stating that he has no memory of the empanelment process that is not reflected in the transcript.

[4] One of the court officers assigned to the trial was a white female. That fact alone, however, does not establish that this court officer was the person who told Ms. Weaver that the courtroom was "closed for jury selection," but it buttresses her testimony.

indicating that the courtroom was "closed," but she remained outside the courtroom for the remainder of that day in deference to the court officer's directive. During a break in the proceedings, Ms. Weaver attempted to enter the courtroom but was told again that the courtroom was closed.

At the end of the day's proceedings, Ms. Weaver informed Attorney Davis that she had been refused entry into the courtroom. Ms. Weaver was especially concerned because her son, who at the time was only nineteen years old, was being tried for murder.[5] She had come to the courthouse at Attorney Davis' invitation because she desired to be present for all phases of the trial.

Attorney Davis did not recall being told of the exclusion. He did not object and, further, would not he have done so because he believed that a courtroom closure for empanelment was constitutional and that an objection would be futile. Because of his belief that the closure was constitutional, he did not discuss the matter with the defendant or suggest to him that his right to a public trial included the empanelment. I credit Attorney Davis' testimony.[6] Given counsel's state of mind, I find that the failure to object was not a

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[5] The defendant was sixteen years old at the time of his arrest on the murder indictment.

[6] The Commonwealth suggested that Mr. Davis' explanation was untrue because he was counsel for the defendant in Commonwealth v. Gordon, 422 Mass. 816, 823-24 (1996), where the public trial issue was addressed on appeal. The Gordon case involved multiple defendants and issues. The public trial issue was not raised by Attorney Davis on behalf of his client. I reject the suggestion that Attorney Davis is dishonest, concluding instead that in the ten or more years after the Gordon decision, he experienced an honest lapse of memory.

strategic choice. I find that the defendant was unaware that the courtroom was closed or that he had a right to a public trial.

Major Dunigan, who accompanied Ms. Weaver to the courthouse on April 7 and April 10 to offer moral and spiritual support, testified that a court officer informed both of them that the courtroom was "closed" during the jury selection. On the first day of the empanelment, a court officer told them to sit in the hallway outside the courtroom and wait until someone told them to come in. Major Dunigan followed what she understood to be the court officer's order and waited outside in the hall for the remainder of the day. While she waited in the hall, no court officer or anyone else ever approached her to invite her into the courtroom and she did not enter the courtroom at any time during the empanelment process.

Ms. Weaver and Major Dunigan both appeared at the courthouse again on April 10, 2006, the second day of the empanelment. As before, a court officer told them they could not enter the courtroom. They remained outside the courtroom in the hall and were never told that they could enter the courtroom.

The Commonwealth called court officers Candia Papile and Edward O'Neill, both of whom were assigned to the defendant's trial during jury selection. Understandably, however, given the passage of time, neither court officer had any specific memory of the empanelment or the case. They testified to the standard empanelment practice in murder cases which required a large venire, usually between sixty and 100 persons. Neither Courtroom 914 nor Courtroom 1015 is large enough to provide seats for a venire of that size. Because of the limited seating, some members of the venire would remain standing through the court's

introduction of the case and the statutory questions. Once this part of process was completed, those persons standing in the gallery would be taken to another courtroom or into the hall outside the courtroom while the court conducted the individual voir dire. If seats became available in the courtroom, court officers would shuttle those prospective jurors waiting outside into the courtroom. The courtroom doors were not locked at any time except during the lunch recess and after the conclusion of the day's business. The court officers all testified that they had never told any member of the public that the courtroom was "closed" for empanelment.[7]

Two Boston Police detectives, Sgt. Det. Thomas J. O'Leary and Sgt. Det. Paul McLaughlin, were present for all or most of the empanelment. Sgt. Det. O'Leary, the Commonwealth's primary investigator, testified that he was familiar with the layout of Courtrooms 1015 and 914 based on his experience with Suffolk County murder trials. He believed that approximately fifty to sixty people could sit in the gallery of each courtroom with an additional sixteen people in the jury box. Sgt. Det. Paul McLaughlin, the other member of the investigating team, was present for the majority of empanelment on both days. Because of his involvement with the case, he was familiar with Ms. Weaver and Major Dunigan. During the empanelment process, he frequently went in and out of the courtroom and saw both women in the hall. He acknowledged their presence but he never told them not to enter the courtroom.

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[7] The court notes, however, the prevalence of the practice as discussed above in note 1.

I credit the testimony of Ms. Weaver and Major Dunigan that a court officer told them that the courtroom was "closed," that they could not enter the courtroom until the empanelment was completed, and that they would be told when they could enter. A court officer gave this closure directive on both April 7 and April 10. I also find that they were never told they could enter the courtroom during the empanelment and that the courtroom remained closed to them and other members of the public for the duration of the empanelment.

The Commonwealth urges this court to reject Ms. Weaver's and Major Dunigan's testimony as biased and not credible. I decline to do so. Because of the importance of the fmding that their testimony is credible, I elaborate on my reasons.

First, this court is in a unique position to assess Ms. Weaver's credibility. As the judge who conducted the evidentiary hearing on the defendant's Motion to Suppress prior to the trial, I am familiar with the witness and her role in the arrest of her son for the murder of Germaine Rucker. Ms. Weaver, suspecting her son's complicity in the killing, embarked on an extraordinary course that ultimately led to her son's confession first and then his arrest for the crime.

Rather than shield her son from the reach of the law, Ms. Weaver gathered her family in their home to pray for her son's soul, marched her son to the Area B police station and, once there, insisted that he confess to the crime. A mother who forces a child to confess to the crime of murder because of some moral or religious imperative and without regard to the legal consequences is, in my judgment, beyond reproach on the matter of credibility. Cf. generally Mass. G. Evid. § 804(b)(3) (hearsay statements against pecuniary

interest bear indicia of trustworthiness). Thus, I am not persuaded by the Commonwealth's argument that her testimony should be discredited as biased and tainted by self-interest.

Second, the trial record supports the witnesses' claim that they were outside the courtroom during the empanelment. Though the assistant district attorney's report to the judge came on the second day of the empanelment, I find it is corroborative of the witnesses' claim that they were outside the courtroom on both days. It would be irrational to allow their presence on the first day of empanelment but deny them that right on the second day of the empanelment when the courtroom crowding was the same on both days.

Third, the defense witnesses' testimony was not rebutted by any of the Commonwealth's witnesses. The court officers' memory lapse, which to their credit was not embellished in any way favorable to the Commonwealth, leaves only the credible testimony of the defense witnesses. Of course, the court is not obliged to credit the defense witnesses' testimony simply because it is not directly rebutted. Nonetheless, it is a factor in weighing the credibility of their testimony.

Considering both the trial transcript and the witnesses' testimony, I find that a court officer, who cannot be identified at this time, closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment. The sole reason for the closure was the crowded condition in the courtroom. Because of the nature of the trial and in accordance with the usual practice, the court requested and received a large venire, between sixty and 100 persons. Even at the low end of this range, neither Courtroom 914 nor 1015 was large enough to

seat all members of the venire. Understandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors. Nonetheless, the court's deference to those interests resulted in the closure of the courtroom to the public.

DISCUSSION

The right to a public trial, granted by the Sixth Amendment to the United States Constitution, extends to pretrial proceedings, including jury selection. Cohen, 456 Mass. at 106 (2010), citing Presley v. Georgia, 130 S. Ct. 721, 723-24 (2010) (per curiam). The value of a public trial lies in the conviction that "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Commonwealth v. Bohmer, 374 Mass. 368, 380 (1978), quoting In re Oliver, 333 U.S. 257, 270 (1948). The right to a public trial is important, but not absolute. Commonwealth v. Martin, 417 Mass. 187, 193 (1994); see also Waller v. Georgia, 467 U.S. 39, 45 (1984), and cases cited.

A court may exclude the public from the courtroom but "only for a cause that outweighs the value of openness." Press Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984). A defendant who seeks a new trial on this ground bears the burden to demonstrate that the public was excluded from his trial. Cohen, 456 Mass. at 107-08. This burden requires a showing that the courtroom was closed in the "constitutional sense" which means that the closing was not trivial or *de minimis* and it occurred either explicitly or implicitly at the court's direction. Lavoie, 80 Mass. App. Ct. at 551. Because violation of the right to a public trial is structural error, the defendant need not show prejudice

to obtain a new trial. Commonwealth v. Downey, 78 Mass. App. Ct. 224, 229 (2010).

The right to a public trial, however, "like other structural rights, can be waived." Alebord, 80 Mass. App. Ct. at 438, and cases cited. Even if a defendant establishes an unconstitutional closure, the court must consider if he waived the right to a public trial if the facts warrant such an inquiry. Shaheen, 2012 WL 2440006, at *3. The Commonwealth bears the burden of establishing waiver. Lavoie, 80 Mass. App. Ct. at 553.

These principles establish the analytical framework for this court's consideration of the defendant's Motion for New Trial based on an alleged violation of the right to a public trial. The issues to be determined on the credible evidence offered by the parties are: (1) whether there was a constitutional closure of the courtroom; (2) if so, whether the closure was justified; and (3) whether the defendant waived his right to a public trial. See id. at 551. I address each of these issues in turn.

1. Constitutional Closure

The analysis of a closure issue requires first an assessment of whether the courtroom was closed in the "constitutional sense." A closure in the "constitutional sense" requires an "affirmative act" by the court intended to exclude the public. Cohen, 456 Mass. at 108, citing United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994). Affirmative acts include explicit orders by the court, Commonwealth v. Downey, 78 Mass. App. Ct. 224 (2010), posting of "closed" signs by court officers, Cohen, 456 Mass. at 108, and unauthorized exclusion orders from court officers, Owens v. United States, 483 F. 3d 48, 63 (1st Cir. 2007).

Though the closure in this case did not involve "closed" signs, locked doors, or an explicit closure order from the court, it nonetheless was a closure in violation of the defendant's right to a public trial. The closure occurred at the direction of court officers who told the family and others that the courtroom was "closed" for empanelment and that the public would be told when they could enter the courtroom. With this directive, members of the defendant's family and other interested persons were denied entry into the courtroom for the entirety of the empanelment. The exclusion by court officers establishes the "affirmative act" necessary for a constitutional closure. See Lavoie, 80 Mass. App. Ct. at 550, 551-52. Thus, the first factor in the analysis favors the defendant. Owens, 483 F.3d at 63.

The closure in this case was "not so trivial or *de minimis* that it falls entirely outside the range of closure in the constitutional sense." Cohen, 456 Mass. at 109. The defendant's mother and other interested members of the public were excluded for the entirety of the empanelment. In the particular circumstances of this case involving a murder defendant charged as a juvenile, the closure to his mother was especially problematic. His mother and her spiritual advisor were important symbols of support to this young murder defendant. See Cohen, 456 Mass. at 110 ("[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter what offense may be charged."); see also Commonwealth v. Wolcott, 77 Mass. App. Ct. 457, 462-63.

2. Full Versus Partial Closure

The court must next determine "whether there was a full closure (applying to all members of the press and public) or a partial one limited to some subset of spectators." Lavoie, 80 Mass. App. Ct. at 551-52. "The

significance of this distinction is two-fold. If a closure is partial, the first factor to applied in analyzing whether the closure [was justified] is relaxed. While a full closure must advance an overriding interest that is likely to be prejudiced, a partial closure may be justified by a substantial reason." Id. at 552 (internal quotation marks and citations omitted). In addition, while a full closure must be supported by "contemporaneous findings adequate to support a full closure, in a partial closure case, the reviewing court may examine the record itself, even in the absence of formal or express findings by the judge." Id.

Here, there can be no doubt that there was a full closure of the courtroom during jury empanelment. "Where a court room is closed to some, but not all, spectators during jury selection, there is a partial rather than full closure of the court room." Commonwealth v. Caldwell, 459 Mass. 271, 282 (2011). Here, there is no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom. Indeed, the circumstances leading to the closure of the courtroom suggest the opposite was true; if there was insufficient space to accommodate Ms. Weaver and Major Dunigan, there would likewise be insufficient space to accommodate any other spectators. Thus, there was a full closure of the courtroom, rather than a partial closure. Contrast Cohen, 456 Mass. at 110 (partial closure where "the record makes clear that there were family members and some other individuals beyond the parties and counsel present in the court room during empanelment."); Commonwealth v. Martin, 39 Mass. App. Ct. 44, 49 (1995) (exclusion of defendant's family members, but not the press, amounted to partial closure).

3. Justification of the Closure

A "constitutional closure" does not, by itself, establish a violation of the right to a public trial. Whether in a given case the defendant's right to a public trial is validly circumscribed must be determined by applying the factors articulated in Waller: (1) whether the party seeking to close the hearing can advance an overriding interest that is likely to be prejudiced; (2) whether the closure is no broader than necessary to protect that interest; (3) whether the trial court considered reasonable alternatives to closing the proceedings, and (4) whether the trial court made findings adequate to support the closure. Waller, 467 U.S. at 48. Assessing these factors, I conclude that the closure in this case cannot be justified as a valid limitation of the defendant's Sixth Amendment rights.

First, courtroom crowding falls short as a justification for the closure at issue here. A full closure of the courtroom "must advance an overriding interest that likely to be prejudiced." Lavoie, 80 Mass. App. Ct. at 552, quoting Cohen, 456 Mass. at 111. Although Cohen, 456 Mass. at 113, suggested that crowding might justify the closing of the courtroom, it did not equate the need to minimize crowding with an "overriding interest." The court's openness to exclusion of the public to accommodate a large venire arose in the context of a partial closure rather than the total closure that occurred here.

The court's citation to Estes v. Texas, 381 U.S. 532 (1965) ("public trial guarantee is not violated if an individual member of the public cannot gain admission to a courtroom because there are no available seats"), likewise does not elevate the minimization of crowding to an "overriding interest." The reference to Estes merely recognized the propriety of a common sense

approach where a spectator arrives to find a filled-to-capacity courtroom. This case is different. The defendant's family and other interested persons did not appear at the door of an already filled courtroom only to be refused entry for lack of space. They were excluded as a matter of course, before any determination whether they could or should be accommodated in the courtroom for the empanelment.

Second, even if management of the crowded conditions in the courtroom rose to the level of "overriding interest," the closure in this case was far broader than necessary in both time and reach. Members of the defendant's family and all other members of the public were denied entry for the entirety of the empanelment, even after seating became available as members of the venire departed from the courtroom. See Rodriguez v. Miller, 82 Fed. App'x 715, 717 (2d Cir. 2003) ("Waller's second mandate-that the closure be no broader than required to protect the overriding interest at stake-necessarily applies to . . . the duration of the closure . . . .").

Third, there were reasonable alternatives to excluding the defendant's mother and the two other individuals seeking entry into the courtroom. For example, after jurors were chosen, it was possible to send them to the jury deliberating room rather than placing them in the jury box. This small change in the procedure would have relieved the pressure on space to allow defendant's family and others to be seated elsewhere in the courtroom while allowing those members of the venire who were standing to take the place of jurors selected for the trial. Also, the configuration of the courtroom certainly allowed space to be set aside, separate and apart from the venire, for the two women who had a particular interest in the

case to observe the proceedings. Cf. Boston Herald, Inc. v. Superior Ct. Dept. of the Trial Ct., 421 Mass. 502, 507 (1995) (First Amendment right of public access to judicial proceedings requires that "[t]he judge must make every effort to arrive at a reasonable alternative to closure."). Given the very small number of persons seeking entry into the courtroom, it would not have been difficult to accommodate both the public and the venire. The addition of these persons would not have made a difference in the crowded condition of the courtroom.

Fourth, it is undisputed that the court made no findings regarding the closure. The court was under no obligation to do so where defense counsel did not object to the closure and the court was likely unaware that courtroom had been closed to the defendant's family and friends. Nonetheless, it was clear, at least on the second day of empanelment, that interested members of the public were outside the courtroom because of the crowded conditions in the courtroom. Thus, the failure to make findings means that the closure cannot be justified. Wolcott, 77 Mass. App. Ct. at 464 ("Where there is a 'full' closure, as here, the trial judge must make his findings contemporaneous[ly] with the closure."); Commonwealth v. Baran, 74 Mass. App. Ct. 256, 292-93 (2009).

In summary, even though it was clear that Ms. Weaver and Major Dunigan were interested parties, the court made no attempt to accommodate them, or to explain why it was not possible to do so. Compare Martin, 417 Mass. at 196 (1994). Based on this court's review of the trial transcript and the hearing testimony, I conclude, therefore, that the Waller factors were not satisfied and the defendant's right to a public trial was not validly circumscribed.

4. Waiver

The Commonwealth argues that defense counsel's failure to object to the courtroom closure effected a waiver of the defendant's right to a public trial. See Mains v. Commonwealth, 433 Mass. 30, 33 n.3 (2000) ("Our courts have held that even structural error is subject to the doctrine of waiver" if the defendant fails to raise the issue in a timely manner.) The defendant counters that no waiver occurred because counsel, who was unaware of the public's right to be present in the courtroom for empanelment, inadvertently failed to object to the closure. In the alternative, defendant argues that the failure to object is ineffective assistance of counsel. The defendant also claims that the Commonwealth's waiver argument fails because he did not personally or knowingly waive his right to a public trial.

A waiver may occur in either of two ways: (1) affirmative waiver of rights; or (2) failure to raise the issue at trial or on appeal, a so-called "procedural" waiver. Lavoie, 464 Mass. at 87. The Commonwealth relies on the latter theory. The argument for "procedural waiver" based on trial counsel's failure to object to the courtroom closure is compelling but not dispositive. Favoring the Commonwealth's position is the court's observation in Cohen that "[f]ailure of a defendant or his counsel to raise an objection when first made aware of an alleged public trial violation is, at the very least, a very strong indication of waiver." Id. at 119 n.35, citing Commonwealth v. Wells, 360 Mass. 846 (1971). Also, in Lavoie, 464 Mass. at 88-89, decided after the submissions on this motion, the Supreme Judicial Court held that "counsel may waive, with or without the defendant's express consent, the right to a public trial during jury selection where the

waiver is a tactical decision as part of counsel's trial strategy." The appeal of the Commonwealth's argument, however, is undercut by two findings: (1) defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial; and (2) the defendant, unaware of his right to a public trial, did not intentionally waive this right.

These findings, based on the evidence presented at the motion hearing, place this case on dramatically different footing than that confronting the court in Lavoie. Lavoie validates reasonable tactical choices resulting in waiver of non-fundamental rights but it does not impose a blanket rule that any and all acts or omissions by counsel must be attributed to the defendant. The necessary deference to counsel's discretion in managing the conduct of the trial renders the defendant's knowledge of his right to a public trial and his acquiescence in counsel's tactical choice irrelevant. Id. at 89-90, quoting Taylor v. Illinois, 484 U.S. 400, 418 (1984) ("The adversary process could not function effectively if every tactical decision required client approval.").

Here, however, counsel's omission was not the product of tactical consideration. Where counsel, through inadvertence or ignorance of the law, fails to object or otherwise preserve the issue for appeal, Lavoie does not dictate waiver. Rather, the court must treat the lapse as any other unpreserved error and determine if it resulted in a substantial risk of miscarriage of justice, using the ineffective assistance of counsel standard. Id. at 89, citing Commonwealth v. Azar, 435 Mass 675, 686-87 (2002)("[W]hether we view the unpreserved claim of error . . . [by] utilizing the substantial risk of miscarriage of justice standard

or . . . by focusing on counsel's ineffectiveness in failing to object to the error, our approach is essentially the same, and . . . the result would be the same."). The issue for this court is whether the lapse constituted ineffective assistance of counsel.

The well-settled rule is that counsel is ineffective if his conduct "falls below that which might be expected from an ordinary fallible lawyer and prejudices the defendant by depriving him of an otherwise available, substantial ground of defence." Commonwealth v. Saferian 366 Mass. 89, 96 (1974). The threshold issue is the reasonableness of counsel's decision at the time it was made.

Given the state of the law in 2006 when this case was tried, counsel should have been aware of the defendant's right to have this family and other interested members of the public attend the empanelment. Though not as clearly articulated as today, the law at that time recognized a defendant's right to a public presence in the courtroom during jury selection. See Waller, 467 U.S. at 46; Gordon, 422 Mass. at 823. Counsel's failure to object to the courtroom closure, stemming from a misunderstanding of the law governing the defendant's right to a public trial, was therefore the product of "serious incompetency, inefficiency, or inattention" to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable. Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 722 (2012). Compare Lavoie, 464 Mass. 90-91 ("defense counsel provided a clear explanation of his practice of not objecting to the exclusion of family members or supporters of his clients in the court room during jury selection . . . . Moreover, he made a specific decision not to object at the defendant's trial. Given these facts . . . defense

counsel's tactical decision . . . was not manifestly unreasonable.") with Commonwealth v. Nwachukwu, 65 Mass. App. Ct. 112, 120 (2005) (defense counsel's mistaken instruction to defendant to wait outside courtroom during critical witness testimony in response to sequestration order indicated troubling "lack of awareness and appreciation . . . of a basic constitutional right" that, alongside other errors, amounted to ineffective assistance of counsel).

The conclusion that counsel's failure to object was not objectively reasonable does not resolve the issue. The court must also determine if the lapse caused prejudice warranting a new trial. Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994). Of course, the defendant is prejudiced in the sense that he cannot now claim the benefit of the presumption of prejudice from the structural error that occurred during the empanelment. However, the option of finding prejudice on that basis alone is foreclosed given dicta in Commonwealth v. Dyer, 460 Mass. 72 &, 737 (2011), suggesting that prejudice must flow from a source other than the waiver itself. The Dyer court found no prejudice because the defendant "point[ed] to no factors suggesting, notwithstanding the waiver, that a substantial likelihood of miscarriage of justice occurred." Id. The court adopted this approach after expressly declining to apply the "structural error" analysis to unpreserved claims. Id. at 736. The defendant has not offered any evidence or legal argument establishing prejudice as defined in Dyer.

Finally, this court rejects the defendant's claim, based on Commonwealth v. Edward, 75 Mass. App. Ct. 162, 173 n.13 (2009), that waiver requires a defendant's personal, knowing assent. First, the court in Lavoie, 464 Mass. at 88, n. 9, implicitly overruled

Edwards on this point. Second, no personal assent is necessary because the right to a public trial is not among that very short list of fundamental rights, including whether to plead guilty, waive the right to a jury trial, testify, take an appeal or waive the right to counsel requiring the defendant's explicit waiver. Dyer, 460 Mass. at 736.

CONCLUSION AND ORDER

For the reasons set forth above, the defendant's Motion for New Trial on the ground that his right to a public trial was violated is **DENIED**.

February 22, 2013

/s/
Geraldine S. Hines
Justice of the Superior Court